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105TH CONGRESS, *2d Session* | SENATE | REPORT 105–186

# THE AMERICAN COMPETITIVENESS ACT

MAY 11, 1998.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary, submitted the following

# REPORT

together with

## ADDITIONAL VIEWS

[To accompany S. 1723]

The Committee on the Judiciary, to which was referred the bill (S. 1723) to amend the Immigration and Nationality Act to assist the United States to remain competitive by increasing the access of United States' firms and institutions of higher education to skilled personnel and by expanding educational and training opportunities for American students and workers and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE; REFERENCES IN ACT.**

(a) SHORT TITLE.—This Act may be cited as the "American Competitiveness Act".

(b) REFERENCES IN ACT.—Except as otherwise specifically provided in this Act, whenever in this Act an amendment or repeal is expressed as an amendment to or a repeal of a provision, the reference shall be deemed to be made to the Immigration and Nationality Act (8 U.S.C. 1101 et seq.).

**SEC. 2. FINDINGS.**

Congress makes the following findings:

(1) American companies today are engaged in fierce competition in global markets.

(2) Companies across America are faced with severe high skill labor shortages that threaten their competitiveness.

(3) The National Software Alliance, a consortium of concerned government, industry, and academic leaders that includes the United States Army, Navy, and Air Force, has concluded that "The supply of computer science graduates is far short of the number needed by industry.". The Alliance concludes that the current severe understaffing could lead to inflation and lower productivity.

(4) The Department of Labor projects that the United States economy will produce more than 130,000 information technology jobs in each of the next 10 years, for a total of more than 1,300,000.

(5) Between 1986 and 1995, the number of bachelor's degrees awarded in computer science declined by 42 percent. Therefore, any short-term increases in enrollment may only return the United States to the 1986 level of graduates and take several years to produce these additional graduates.

(6) A study conducted by Virginia Tech for the Information Technology Association of America estimates that there are more than 340,000 unfilled positions for highly skilled information technology workers in American companies.

(7) The Hudson Institute estimates that the unaddressed shortage of skilled workers throughout the United States economy will result in a 5-percent drop in the growth rate of GDP. That translates into approximately $200,000,000,000 in lost output, nearly $1,000 for every American.

(8) It is necessary to deal with the current situation with both short-term and long-term measures.

(9) In fiscal year 1997, United States companies and universities reached the cap of 65,000 on H–1B temporary visas a month before the end of the fiscal year. In fiscal year 1998 the cap is expected to be reached as early as May if Congress takes no action. And it will be hit earlier each year until backlogs develop of such a magnitude as to prevent United States companies and researchers from having any timely access to skilled foreign-born professionals.

(10) It is vital that more American young people be encouraged and equipped to enter technical fields, such as mathematics, engineering, and computer science.

(11) If American companies cannot find home-grown talent, and if they cannot bring talent to this country, a large number are likely to move key operations overseas, sending those and related American jobs with them.

(12) Inaction in these areas will carry significant consequences for the future of American competitiveness around the world and will seriously undermine efforts to create and keep jobs in the United States.

**SEC. 3. INCREASED ACCESS TO SKILLED PERSONNEL FOR UNITED STATES COMPANIES AND UNIVERSITIES.**

(a) ESTABLISHMENT OF H1–C NONIMMIGRANT CATEGORY.—

(1) IN GENERAL.—Section 101(a)(15)(H)(i) (8 U.S.C. 1101(a)(15)(H)(i)) is amended—

(A) by inserting "and other than services described in clause (c)" after "subparagraph (O) or (P)"; and

(B) by inserting after "section 212(n)(1)" the following: ", or (c) who is coming temporarily to the United States to perform labor as a health care worker, other than a physician, in a specialty occupation described in section 214(i)(1), who meets the requirements of the occupation specified in section 214(i)(2), who qualifies for the exemption from the grounds of inadmissibility described in section 212(a)(5)(C), and with respect to whom the Attorney General certifies that the intending employer has filed with the Attorney General an application under section 212(n)(1).".

(2) CONFORMING AMENDMENTS.—

(A) Section 212(n)(1) is amended by inserting "or (c)" after "section 101(a)(15)(H)(i)(b)" each place it appears.

(B) Section 214(i) is amended by inserting "or (c)" after "section 101(a)(15)(H)(i)(b)" each place it appears.

(3) TRANSITION RULE.—Any petition filed prior to the date of enactment of this Act, for issuance of a visa under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act on behalf of an alien described in the amendment made by paragraph (1)(B) shall, on and after that date, be treated as a petition filed under section 101(a)(15)(H)(i)(c) of that Act, as added by paragraph (1).

(b) ANNUAL CEILINGS FOR H1–B AND H1–C WORKERS.—

(1) AMENDMENT OF THE INA.—Section 214(g)(1) (8 U.S.C. 1184(g)(1)) is amended to read as follows:

"(g)(1) The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year—

"(A) under section 101(a)(15)(H)(i)(b)—

"(i) for each of fiscal years 1992 through 1997, may not exceed 65,000,

"(ii) for fiscal year 1998, may not exceed 95,000,

"(iii) for fiscal year 1999, may not exceed the number determined for fiscal year 1998 under such section, minus 10,000, plus the number of unused visas under subparagraph (B) for the fiscal year preceding the applicable fiscal year, and

"(iv) for fiscal year 2000, and each applicable fiscal year thereafter through fiscal year 2002, may not exceed the number determined for fiscal year 1998 under such section, minus 10,000, plus the number of unused visas under subparagraph (B) for the fiscal year preceding the applicable fiscal year, plus the number of unused visas under subparagraph (C) for the fiscal year preceding the applicable fiscal year;

"(B) under section 101(a)(15)(H)(ii)(b), beginning with fiscal year 1992, may not exceed 66,000; or

"(C) under section 101(a)(15)(H)(i)(c), beginning with fiscal year 1999, may not exceed 10,000.

For purposes of determining the ceiling under subparagraph (A) (iii) and (iv), not more than 20,000 of the unused visas under subparagraph (B) may be taken into account for any fiscal year.".

(2) TRANSITION PROCEDURES.—Any visa issued or nonimmigrant status otherwise accorded to any alien under clause (i)(b) or (ii)(b) of section 101(a)(15)(H) of the Immigration and Nationality Act pursuant to a petition filed during fiscal year 1998 but approved on or after October 1, 1998, shall be counted against the applicable ceiling in section 214(g)(1) of that Act for fiscal year 1998 (as amended by paragraph (1) of this subsection), except that, in the case where counting the visa or the other granting of status would cause the applicable ceiling for fiscal year 1998 to be exceeded, the visa or grant of status shall be counted against the applicable ceiling for fiscal year 1999.

**SEC. 4. EDUCATION AND TRAINING IN SCIENCE AND TECHNOLOGY.**

(a) DEGREES IN MATHEMATICS, COMPUTER SCIENCE, AND ENGINEERING.—Subpart 4 of part A of title IV of the Higher Education Act of 1965 (20 U.S.C. 1070c et seq.) is amended—

(1) in section 415A(b)(1) (20 U.S.C. 1070c(b)(1))—

(A) by striking "$105,000,000 for fiscal year 1993" and inserting "$155,000,000 for fiscal year 1999"; and

(B) by inserting ", of which the amount in excess of $25,000,000 for each fiscal year that does not exceed $50,000,000 shall be available to carry out section 415F for the fiscal year" before the period; and

(2) by adding at the end the following:

**"SEC. 415F. DEGREES IN MATHEMATICS, COMPUTER SCIENCE, AND ENGINEERING.**

"(a) ALLOTMENTS AND GRANTS.—From amounts made available to carry out this section under section 415A(b)(1) for a fiscal year, the Secretary shall make allotments to States to enable the States to pay not more than 50 percent of the amount of grants awarded to low-income students in the States.

"(b) USE OF GRANTS.—Grants awarded under this section shall be used by the students for attendance on a full-time basis at an institution of higher education in a program of study leading to an associate, baccalaureate or graduate degree in mathematics, computer science, or engineering.

"(c) COMPARABILITY.—The Secretary shall make allotments and grants shall be awarded under this section in the same manner, and under the same terms and conditions, as—

"(1) the Secretary makes allotments and grants are awarded under this subpart (other than this section); and

"(2) are not inconsistent with this section.".

(b) DATA BANK; TRAINING.—

(1) IN GENERAL.—The Secretary of Labor shall—

(A) establish or improve a data bank on the Internet that facilitates—

(i) job searches by individuals seeking employment in the field of technology; and

(ii) the matching of individuals possessing technology credentials with employment in the field of technology; and

(B) provide training in information technology to unemployed individuals who are seeking employment.

(2) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated for fiscal year 1999 and each of the 4 succeeding fiscal years—

(A) $8,000,000 to carry out paragraph (1)(A); and

(B) $10,000,000 to carry out paragraph (1)(B).

**SEC. 5. INCREASED ENFORCEMENT PENALTIES AND IMPROVED OPERATIONS.**

(a) INCREASED PENALTIES FOR VIOLATIONS OF H1–B OR H1–C PROGRAM.—Section 212(n)(2)(C) (8 U.S.C. 1182(n)(2)(C)) is amended—

(1) by striking "a failure to meet" and all that follows through "an application—" and inserting "a willful failure to meet a condition in paragraph (1) or a willful misrepresentation of a material fact in an application—"; and

(2) in clause (i), by striking "$1,000" and inserting "$5,000".

(b) SPOT INSPECTIONS DURING PROBATIONARY PERIOD.—Section 212(n)(2) (8 U.S.C. 1182(n)(2)) is amended—

(1) by redesignating subparagraph (D) as subparagraph (E); and

(2) by inserting after subparagraph (C) the following:

"(D) The Secretary of Labor may, on a case-by-case basis, subject an employer to random inspections for a period of up to five years beginning on the date that such employer is found by the Secretary of Labor to have engaged in a willful failure to meet a condition of subparagraph (A), or a misrepresentation of material fact in an application.".

(c) LAYOFF PROTECTION FOR UNITED STATES WORKERS.—Section 212(n)(2) (8 U.S.C. 1182(n)(2)), as amended by subsection (b), is further amended by adding at the end the following:

"(F)(i) If the Secretary finds, after notice and opportunity for a hearing, a willful failure to meet a condition in paragraph (1) or a willful misrepresentation of a material fact in an application, in the course of which the employer has replaced a United States worker with a nonimmigrant described in section 101(a)(15)(H)(i) (b) or (c) within the 6-month period prior to, or within 90 days following, the filing of the application—

"(I) the Secretary shall notify the Attorney General of such finding, and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $25,000 per violation) as the Secretary determines to be appropriate; and

"(II) the Attorney General shall not approve petitions filed with respect to the employer under section 204 or 214(c) during a period of at least 2 years for aliens to be employed by the employer.

"(ii) For purposes of this subparagraph:

"(I) The term 'replace' means the employment of the nonimmigrant at the specific place of employment and in the specific employment opportunity from which a United States worker with substantially equivalent qualifications and experience in the specific employment opportunity has been laid off.

"(II) The term 'laid off', with respect to an individual, means the individual's loss of employment other than a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant, contract, or other agreement. The term 'laid off' does not include any situation in which the individual involved is offered, as an alternative to such loss of employment, a similar employment opportunity with the same employer at the equivalent or higher compensation and benefits as the position from which the employee was discharged, regardless of whether or not the employee accepts the offer.

"(III) The term 'United States worker' means—

"(aa) a citizen or national of the United States;

"(bb) an alien who is lawfully admitted for permanent residence; or

"(cc) an alien authorized to be employed by this Act or by the Attorney General.".

(d) EXPEDITED REVIEWS AND DECISIONS.—Section 214(c)(2)(C) (8 U.S.C. 1184(c)(2)(C)) is amended by inserting "or section 101(a)(15)(H)(i)(b)" after "section 101(a)(15)(L)".

(e) DETERMINATIONS ON LABOR CONDITION APPLICATIONS TO BE MADE BY ATTORNEY GENERAL.—

(1) IN GENERAL.—Section 101(a)(15)(H)(i)(b) (8 U.S.C. 1101(a)(15)(H)(i)(b)) is amended by striking "with respect to whom" and all that follows through "with the Secretary" and inserting "with respect to whom the Attorney General determines that the intending employer has filed with the Attorney General".

(2) CONFORMING AMENDMENTS.—Section 212(n) (8 U.S.C. 1182(n)(1)) is amended—

(A) in paragraph (1)—

(i) in the first sentence, by striking "Secretary of Labor" and inserting "Attorney General";

(ii) in the sixth and eighth sentences, by inserting "of Labor" after "Secretary" each place it appears;

(iii) in the ninth sentence, by striking "Secretary of Labor" and inserting "Attorney General";

(iv) by amending the tenth sentence to read as follows: "Unless the Attorney General finds that the application is incomplete or obviously inaccurate, the Attorney General shall provide the certification described in section 101(a)(15)(H)(i)(b) and adjudicate the nonimmigrant visa petition."; and

(v) by inserting in full measure margin after subparagraph (D) the following new sentence: "Such application shall be filed with the employer's petition for a nonimmigrant visa for the alien, and the Attorney General shall transmit a copy of such application to the Secretary of Labor."; and

(B) in the first sentence of paragraph (2)(A), by striking "Secretary" and inserting "Secretary of Labor".

(f) PREVAILING WAGE CONSIDERATIONS.—Section 101 (8 U.S.C. 1101) is amended by adding at the end the following new subsection:

"(i)(1) In computing the prevailing wage level for an occupational classification in an area of employment for purposes of section 212(n)(1)(A)(i)(II) and section 212(a)(5)(A) in the case of an employee of—

"(A) an institution of higher education (as defined in section 1201(a) of the Higher Education Act of 1965), or a related or affiliated nonprofit entity, or

"(B) a nonprofit or Federal research institute or agency,

the prevailing wage level shall only take into account employees at such institutions, entities, and agencies in the area of employment.

"(2) With respect to a professional athlete (as defined in section 212(a)(5)(A)(iii)(II)) when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations shall be considered as not adversely affecting the wages of United States workers similarly employed and be considered the prevailing wage.

"(3) To determine the prevailing wage, employers may use either government or nongovernment published surveys, including industry, region, or statewide wage surveys, to determine the prevailing wage, which shall be considered correct and valid if the survey was conducted in accordance with generally accepted industry standards and the employer has maintained a copy of the survey information.".

(g) POSTING REQUIREMENT.—Section 212(n)(1)(C)(ii) (8 U.S.C. 1182(n)(1)(C)(ii)) is amended to read as follows:

"(ii) if there is no such bargaining representative, has provided notice of filing in the occupational classification through such methods as physical posting in a conspicuous location, or electronic posting through an internal job bank, or electronic notification available to employees in the occupational classification.".

**SEC. 6. ANNUAL REPORTS ON H1–B VISAS.**

Section 212(n) (8 U.S.C. 1182(n)) is amended by adding at the end the following:

"(3) Using data from petitions for visas issued under section 101(a)(15)(H)(i)(b), the Attorney General shall annually submit the following reports to Congress:

"(A) Quarterly reports on the numbers of aliens who were provided nonimmigrant status under section 101(a)(15)(H)(i)(b) during the previous quarter and who were subject to the numerical ceiling for the fiscal year established under section 214(g)(1).

"(B) Annual reports on the occupations and compensation of aliens provided nonimmigrant status under such section during the previous fiscal year.".

**SEC. 7. STUDY AND REPORT ON HIGH-TECHNOLOGY LABOR MARKET NEEDS.**

(a) STUDY.—The National Science Foundation shall oversee the National Academy of Sciences in establishing a government-industry panel, including representatives from academia, government, and business, to conduct a study, using sound analytical methods, to assess the labor market needs for workers with high technology skills during the 10-year period beginning on the date of enactment of this Act. The study shall focus on the following issues:

(1) The future training and education needs of the high-technology sector over that 10-year period, including projected job growth for high-technology issues.

(2) Future training and education needs of United States students to ensure that their skills, at various levels, are matched to the needs of the high technology and information technology sector over that 10-year period.

(3) An analysis of progress made by educators, employers, and government entities to improve the teaching and educational level of American students in the fields of math, science, computer, and engineering since 1998.

(4) An analysis of the number of United States workers currently or projected to work overseas in professional, technical, and managerial capacities.

(5) The following additional issues:

(A) The need by the high-technology sector for foreign workers with specific skills.

(B) The potential benefits gained by the universities, employers, and economy of the United States from the entry of skilled professionals in the fields of science and engineering.

(C) The extent to which globalization has increased since 1998.

(D) The needs of the high-technology sector to localize United States products and services for export purposes in light of the increasing globalization of the United States and world economy.

(E) An examination of the amount and trend of high technology work that is out-sourced from the United States to foreign countries.

(b) REPORT.—Not later than October 1, 2000, the National Science Foundation shall submit a report containing the results of the study described in subsection (a) to the Committees on the Judiciary of the House of Representatives and the Senate.

(c) AVAILABILITY OF FUNDS.—Funds available to the National Science Foundation shall be made available to carry out this section.

**SEC. 8. LIMITATION ON PER COUNTRY CEILING WITH RESPECT TO EMPLOYMENT-BASED IMMIGRANTS.**

(a) SPECIAL RULES.—Section 202(a) (8 U.S.C. 1152(a)) is amended by adding at the end the following new paragraph:

"(5) RULES FOR EMPLOYMENT-BASED IMMIGRANTS.—

"(A) EMPLOYMENT-BASED IMMIGRANTS NOT SUBJECT TO PER COUNTRY LIMITATION IF ADDITIONAL VISAS AVAILABLE.—If the total number of visas available under paragraph (1), (2), (3), (4), or (5) of section 203(b) for a calendar quarter exceeds the number of qualified immigrants who may otherwise be issued such visas, the visas made available under that paragraph shall be issued without regard to the numerical limitation under paragraph (2) of this subsection during the remainder of the calendar quarter.

"(B) LIMITING FALL ACROSS FOR CERTAIN COUNTRIES SUBJECT TO SUBSECTION (e).—In the case of a foreign state or dependent area to which subsection (e) applies, if the total number of visas issued under section 203(b) exceeds the maximum number of visas that may be made available to immigrants of the state or area under section 203(b) consistent with subsection (e) (determined without regard to this paragraph), in applying subsection (e) all visas shall be deemed to have been required for the classes of aliens specified in section 203(b).".

(b) CONFORMING AMENDMENTS.—

(1) Section 202(a)(2) (8 U.S.C. 1152(a)(2)) is amended by striking "paragraphs (3) and (4)" and inserting "paragraphs (3), (4), and (5)".

(2) Section 202(e)(3) (8 U.S.C. 1152(e)(3)) is amended by striking "the proportion of the visa numbers" and inserting "except as provided in subsection (a)(5), the proportion of the visa numbers".

(c) ONE-TIME PROTECTION UNDER PER COUNTRY CEILING.—Notwithstanding section 214(g)(4) of the Immigration and Nationality Act, any alien who—

(1) as of the date of enactment of this Act is a nonimmigrant described in section 101(a)(15)(H)(i) of that Act;

(2) is the beneficiary of a petition filed under section 204(a) for a preference status under paragraph (1), (2), or (3) of section 203(b); and

(3) would be subject to the per country limitations applicable to immigrants under those paragraphs but for this subsection,

may apply for and the Attorney General may grant an extension of such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made thereon.

**SEC. 9. ACADEMIC HONORARIA.**

Section 212 (8 U.S.C. 1182) is amended by adding at the end the following new subsection:

"(p) Any alien admitted under section 101(a)(15)(B) may accept an honorarium payment and associated incidental expenses for a usual academic activity or activities, as defined by the Attorney General in consultation with the Secretary of Education, if such payment is offered by an institution of higher education (as defined in section 1201(a) of the Higher Education Act of 1965) or other nonprofit entity and is made for services conducted for the benefit of that institution or entity.".

## I. PURPOSE

In the Information Age, when skilled workers are at a premium, America faces a serious dilemma when employers find that they cannot grow, innovate, and compete in global markets without increased access to skilled personnel. The current shortage of such skilled personnel presents both a short-term and a long-term problem. The country needs to increase its access to skilled personnel immediately in order to prevent current needs from going unfilled. However, to meet these needs over the long term, the American education system must produce more young people in key fields, and we must increase our other training efforts, so that more Americans can be prepared to keep this country at the cutting edge and competitive in global markets.

S. 1723 addresses both aspects of this problem. In order to meet immediate needs, the bill raises the current ceiling on the temporary hiring of skilled foreign nationals in specialty occupations. Under the Immigration and Nationality Act, employers are authorized to hire no more than 65,000 of these workers, a limit set in 1990. This ceiling is now proving inadequate in large measure due to the increase in the globalization of the U.S. economy and the growth of the U.S. economy generally and in certain industries in particular. For the first time, the ceiling was reached 1 month before the end of fiscal year 1997 and is projected to be reached more than 4 months before the end of fiscal year 1998. Without legislation, U.S. employers will not be able lawfully to hire skilled foreign nationals in the United States on H–1B's for the remainder of fiscal year 1998. Moreover, the extensive backlogs that will develop without legislative action will worsen the problem in each succeeding fiscal year.

S. 1723 also addresses the long-term problem that too few U.S. students are entering and excelling in mathematics, computer science, engineering and related fields in sufficient numbers. It contains measures to encourage more young people to study mathematics, engineering and computer science, to disseminate information about the availability of jobs in these fields, and to train unemployed persons in these areas.

## II. LEGISLATIVE HISTORY

This legislation was introduced by Senator Abraham and is co-sponsored by Senators Hatch, McCain, DeWine, Specter, Grams, Brownback, Santorum, Thurmond, Ashcroft, Smith (OR), Hagel, Bennett, Mack, and Coverdell.

A hearing was held on February 25, 1998, in the Committee on the Judiciary prior to the introduction of the legislation. The bill was not referred to subcommittee but was considered directly by the Committee on the Judiciary. It was marked up on April 2, 1998, and reported out of Committee with a favorable recommendation by a 12-to-6 vote.

## III. DISCUSSION

### A. The Current Situation

#### 1. CURRENT LAW

Under current law, the United States may issue up to 65,000 H–1B visas annually. These visas are valid for 3 years, after which they can be renewed for an additional 3 years, thus allowing a maximum stay of 6 years. Persons admitted under these visas cannot stay permanently unless they are sponsored by an employer for a separate permanent employment-based immigrant visa, for which there is a generally lengthy separate approval process.

In order to qualify for an H–1B visa, an individual must be in a "specialty occupation." According to the law:

> The term "specialty occupation" means an occupation that requires—(A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

To qualify for an H–1B visa a nonimmigrant must have "full state licensure to practice in the occupation, if such licensure is required to practice in the occupation" or must possess "experience in the specialty equivalent to the completion of [a bachelor's or higher degree], and recognition of expertise in the specialty through progressively responsible positions relating to the specialty."

As this language suggests, Congress has never limited use of H–1B visas to the "best and brightest." In fact, the phrase "best and brightest" does not appear in the law. There are at least four reasons why an employer may choose to hire a foreign national on an H–1B visa: (1) the individual possesses unique knowledge or skills; (2) the person is an individual who can localize service or products based on their native knowledge of the language or culture of the market in which the service or product will be sold; (3) the company is building a global workforce (for example it is planned that the person will work in the United States to gain experience for a period of years before being sent to work overseas for the employer); and (4) an employer finds an inadequate number of highly qualified U.S. workers available for positions that need to be filled. These four reasons encompass a wide variety of situations where

hiring an H–1B worker can increase the productivity of an employer in almost any industry, and caution against new specific mandates or requirements likely to inadvertently harm many employers. It is worth noting that three of these four reasons have nothing to do with whether or not there is a shortage in a particular field.

2. THE 1990 ACT

Prior to 1990, there was no cap on H–1B visas, which previously were called H–1 visas. As part of a comprehensive package of immigration law reforms, the Immigration Act of 1990 added the 65,000 cap, a number that was essentially chosen arbitrarily in order to provide reassurance to critics of these visas that an unlimited supply of them would not be available, and despite contemporaneous expressions of concern that this limit would eventually have an adverse impact on American companies' and universities' access to skilled personnel and hence on their potential growth. "The [65,000] number was set without public hearings, is arbitrary, and was in no way arrived at by analyzing demand, labor shortages, business conditions, or skilled labor needed by firms to remain globally competitive," according to Pro. Charles B. Keely of Georgetown University.

In addition, to respond to concerns about wages, the 1990 Act added a Labor Condition Attestation (LCA) to the program that required companies to attest they were paying individuals on H–1B's the higher of the prevailing wage or actual wage paid to similarly employed Americans. Under that provision, in order to obtain approval for bringing somebody in on an H–1B visa, under the law an employer must file an application with the Secretary of Labor stating:

> The employer—is offering and will offer during the period of authorized employment to aliens admitted or provided status as a nonimmigrant described in section 101(a)(15)(H)(I)(b) wages that are at least—(I) the actual wage level paid by the employer to all other individuals with similar experience qualifications for the specific employment in question, or (II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available at the time of filing the application, and (ii) will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed.

In order to secure enforcement of these requirements, the 1990 act required the employer to provide notice of the fact that it is hiring a worker on an H–1B visa and the salary at which it is hiring the worker either to the collective bargaining representative of employees in the relevant occupational classification and area or, if there is none, to the employees themselves by posting this information at conspicuous locations at the place of employment. It also established a complaint mechanism for anyone who knew that these requirements were not being complied with to use, and authorized the Department of Labor to investigate these complaints and, if it

found them meritorious, take appropriate action against violators, ranging from fines to debarment from use of H–1B visas.

### 3. THE CURRENT CRISIS

The 65,000 cap on H–1B visas set in 1990 proved sufficient for a number of years. In 1997, however, for the first time companies bumped up against it a month before the end of the fiscal year. The situation this year is much worse: As of May 1998 and for the remainder of fiscal year 1998, no foreign-born professional can be hired in America on a new H–1B petition, according to the Immigration and Naturalization Service, unless Congress acts to raise the cap. That is because there already are sufficient visas approved or pending applications for H–1B status to exceed the 65,000 cap on H–1B visas set in the Immigration Act of 1990. In turn, the backlog that will develop for fiscal year 1999 may mean the 65,000 allotment will be reached by January 1999, thereby preventing companies, universities, and other nonprofits from using H–1B visas to gain access to skilled foreign-born professionals.

There has been some debate, principally among authors of various academic studies, about whether there is a high-tech worker shortage and if so what is the proper way of measuring it. In the real world, however, there does not seem to be serious disagreement on this point. Virtually no employers the Committee has contacted have related anything but a serious difficulty in finding skilled individuals to fill key positions. The employers have found that these unfilled positions are limiting their companies growth potential and ability to create more jobs, products, and services for Americans. This is not surprising since, for example, the unemployment rate among electrical engineers nationally is below 1 percent (0.4 percent).

We see other indicators of the tightness of the labor market. ComputerWorld reports that for many IT jobs annual salary increases were 10 to 20 percent annually in 1997. Salaries for certain IT occupations have risen more than 15 percent annually in recent years, according to William M. Mercer. "Starting salaries for Berkeley BSCS degree-holders averaged $47,000 last spring, 17.5 percent higher than in 1995. The campus placement center is booked solid. I have witnessed industry recruiters outside our building wearing signs that read 'will trade pizza for a resume,'" according to Randy H. Katz, chair, Department of Electrical Engineering and Computer Sciences, UC Berkeley. The Federal Reserve's survey of economic conditions made public on March 19 stated "shortages of both skilled-and entry-level workers worsened." Companies appear so desperate for workers they are even hiring teenagers part-time at $50,000 a year, as The Washington Post reported in a March 1 front-page article. In 1996, spending for recruitment ads in newspapers totaled nearly $5.8 billion, more than triple the $1.9 billion spent in 1991, according to the Newspaper Association of America.

Andrew Grove, Chairman of Intel Corp., has stated that the issue is not so much a shortage of people, but restrictions in U.S. immigration law that prevent talented and highly qualified people from being hired off of U.S. university campuses and elsewhere. It is worth noting that in discussing the Midwest, Federal Reserve economist Richard E. Kraglic stated, "The region is not just run-

ning out of workers; it is running out of potential workers." This is having a negative impact on economic growth, says economist Diane Swonk at First Chicago NBD. "We're slowing because we've run out of people to employ." The Hudson Institute estimates that the unaddressed shortage of skilled workers throughout the U.S. economy will result in a 5-percent drop in the growth rate of GDP. That translates into approximately $200 billion in lost output, nearly $1,000 for every American.

Those asserting that there is no shortage have relied heavily on a March 24 letter by the General Accounting Office (GAO) to two Members of Congress. In this letter, however, GAO made it very clear that it was not asserting that there is no shortage and indeed that it did not perform an independent analysis of whether or not a shortage of high-tech workers exists. Rather, the thrust of the letter was to raise questions about the methodology used by other studies in measuring whether there was a shortage and if so what its magnitude is. The U.S. Department of Commerce responded to the GAO letter by charging it contained "several inaccuracies." The Commerce Department states that it did, for example, discuss that graduates with degrees outside of the computer and information sciences can and do enter the IT field. The Virginia Tech researchers for ITAA responded that their survey's methodology was sound. The researchers said GAO made a mistake in evaluating the study's response rate, pointing out the actual response rate was 60 percent, not 36 percent as GAO reported, and that, moreover, there was little nonresponse bias in the survey. Phil Peters, a senior fellow of the Alexis de Tocqueville Institution, analyzed both sides and seriously questions the conclusions of the General Accounting Office.

Even taken on its own terms, the limitations of GAO's report counsel caution against investing in GAO the responsibility of advising policymakers about the existence of a shortage—a project GAO itself did not claim to have undertaken, and that, particularly in specialized fields, it is very unlikely it possesses the tools to undertake because of the difficulty of the research involved, the creativity necessary, and the shortcomings of available government data, such as BLS wage data, in narrow fields and which GAO generally relies upon. This is particularly true when making an evaluation of how many highly skilled specialty workers should be admitted who will make up such a small percentage of the overall U.S. labor force annually.

At the end of the day, it seems almost impossible to continue to debate whether we need to raise the H–1B cap to address the current shortage of highly skilled workers in the face of the current facts concerning H–1B visa usage itself. The recent enormous increase in the use of H–1B visas—without any change in U.S. law—is itself very powerful evidence that employers need access to the individuals they are recruiting in this fashion in order to grow, prosper, and compete internationally. Between 1997 and 1998, the use of the visas increased by approximately 45 percent. Projecting this demand to continue at this pace through the end of fiscal year 1998, 95,000 of these visas will be needed, or 30,000 more than current law allows. Unless Congress acts, the use of H–1B visas to hire foreign nationals, often foreign students recruited off U.S. col-

lege campuses, will become prohibited for months and even potentially a year or more at a time because of the backlogs that will develop.

## B. The Likely Consequences of a Failure To Act

### 1. THE IMPACT ON AMERICAN JOBS

Artificially limiting companies' ability to hire skilled foreign professionals will stymie our country's economic growth and thereby partially atrophy its creation of American jobs. Thus, contrary to the claims of some critics of the H–1B program, American workers' interests are advanced, rather than retarded, by raising the H–1B cap.

A letter signed by the CEO's of fourteen of America's leading companies, including Microsoft's Bill Gates, Netscape's James Barksdale, and Texas Instruments' Thomas Engibous, put this point well:

> Failure to increase the H–1B cap and the limits that will place on the ability of American companies to grow and innovate will also limit the growth of jobs available to American workers. * * * Failure to raise the H–1B cap will aid our foreign competitors by limiting the growth and innovation potential of U.S. companies while pushing talented people away from our shores. * * * [this] could mean a loss of America's high technology leadership in the world.

At a February 25 hearing, the Committee heard testimony that strongly indicates individuals on H–1B visas create many jobs in America. T.J. Rodgers, president and CEO of Cypress Semiconductor, testified that for every foreign-born engineer he can hire, he employs five other American employees in marketing, manufacturing, or related endeavors. Anant Agrawal, born in India, entered the country on an H–1B visa. When he started working at Sun Microsystems the company employed fewer than 300 people. Combining his talents with another engineer, he developed SPARC, a powerful microprocessor that proved to be a dramatic innovation in chip design, according to Sun Microsystems. Today, Sun employs more than 23,000 people, the majority of whom do work related to Agrawal's innovation.

Moreover, failure to raise the cap on H–1B visas will almost certainly have the effect of causing some U.S. companies to push some of their operations offshore. The Committee believes it is essential to avoid this danger by removing the artificial limits on companies' access to skilled personnel created if too few H–1B visas available and resisting the call to impose regulations on their use that are so excessive that the effect is the same.

This danger is not fanciful speculation. According to ITAA, in 1997, more than 100,000 U.S. jobs in the information technology field were outsourced to India. Moreover, IT companies operating in both countries have told the Committee that an employee earning $60,000 a year in the U.S. would only be paid $6,000 a year in India. IT companies have also told the Committee that despite this salary differential, right now, on balance, most American companies would prefer to have their work done on-site, where for ex-

ample, they can better monitor the quality of what is being done, but that if they cannot get the people they need on-site, they will have the work done elsewhere.

Many of the concerns about H–1B visas revolve around the fear that individuals entering on H–1B visas "take" a job from an American worker. This fear, however, arises from the premise that there is a fixed number of jobs and competition for which is a zero-sum game. But this premise is plainly flawed. Just since passage of the 1990 act, the number of U.S. jobs has increased by more than 12 million and the Internet, which was used by a few thousand specialists back in 1990, now is used by tens of millions and is a major source of jobs and innovation in America. Since 1960, the number of U.S. jobs has more than doubled from 65 million to over 130 million today. These figures are simply the application of the general principle that labor markets have demonstrated time and time again: additional people entering the labor force, whether native-born students out of school, immigrants, or nonimmigrants, expand job opportunities and create other jobs through innovation, entrepreneurship, and money spent on consumer items like food, clothing, and housing, as pointed out in the 1986 Economic Report of the President.

Moreover, looking at the particular case of individuals on H–1B visas, there is no evidence that they are harming the job prospects of native-born Americans. According to National Science Foundation data, there is no correlation between the percentage of foreign-born in a field and the unemployment rate in that field. The data show that fields with a high percentage of the foreign-born, such as computer science and engineering, have lower unemployment rates than fields with relatively few foreign-born, such as the geosciences and social sciences. And there is abundant evidence that the U.S. economy, its industries, and its universities, which are recognized as the best in the world, have all prospered from skilled foreign nationals and immigrants working side by side with native-born Americans.

Finally, it seems worth noting that in 1991, the annual ceiling of H–1B's represented 0.055 percent of the U.S. civilian employment. In 1998, it is a smaller 0.05 percent given the growth of the labor force. The passage of the American Competitiveness Act will increase the annual flow of H–1B's as a proportion of the U.S. civilian labor force in 1998 by approximately 0.023 percentage points. Even in particular industries, the expansion of the labor force will be tiny in percentage terms. It seems very unlikely that so minuscule a change in the composition of this country's workforce could have an appreciable negative impact on American employees.

### 2. IMPACT ON AMERICAN SALARIES

It has also been suggested that raising the cap on H–1B visas will have a negative impact on salaries for Americans in the same occupations, and that in fact one reason employers may want to bring in H–1B workers is to economize on costs. But there are no data to support these concerns. For instance, there are additional legal costs to hiring an individual on an H–1B. Moreover, National Science Foundation data show that the typical foreign-born scientist and engineer earns more, not less, than his or her native-

born counterpart, according to the Wall Street Journal. The 1996 worldwide salary survey conducted by EE Times, a publication that covers the electrical engineering field, provides further evidence of this. Among the findings of the survey:

> American-born engineers earned a mean salary of $66,000, fully $1,400 below the total mean. Immigrants from India ($74,400) and Hong Kong ($76,800) pulled up the averages for foreign-born engineers. Newcomers from China at $65,800 [only $200 below the mean] lagged behind them. This illustrates a point made in earlier surveys * * * no evidence exists of immigrants dragging down overall salaries.

The EE Times survey stated that it found no evidence of exploitation. "Not a single one of the 137 non-U.S.-born engineers or managers earned under $35,000. By contrast 28 American readers did."

Thus, what evidence we have suggests that American wages are not being undercut by H–1B workers, particularly in light of market forces and the role innovation plays in propelling the fields in question forward. There is also no evidence that companies maintain two wage scales for native-born and H–1B employees working side by side one another in the same occupations. Provisions in current law governing the hiring of H–1B workers, which require employers to pay H–1B workers the higher of prevailing or actual wages and to provide them working conditions that do not adversely affect the working conditions of others similarly situated, in fact forbid any such a practice. Moreover it would not work: especially given the fierce competition for skilled workers, an H–1B employee who is not being treated fairly can easily be petitioned by another employer and switch to work for that employer.

Indeed, the Committee understands that such job changes are fairly common among H–1B workers, since the occurrence of such job changes and the INS's difficulty in accounting for them artificially inflated the count of the number of H–1B visas in use last fiscal year and for a period of time prompted concerns that the cap had been reached well before it had in fact been hit. Finally, many H–1B's are foreign students recruited off U.S. college campuses in the same process through which companies hire native-born students, so it would be unexpected if employers are creating different wage scales for the two groups. Indeed, at the Committee's hearing, Steven Levin of Texas Instruments testified that the situation is so competitive today that there are more companies recruiting at M.I.T. than there are graduates in high tech fields annually.

In his testimony, Levin also provided data on starting salaries for various field that cast real doubt on the proposition that salaries in these areas are suffering from any kind of deflationary pressure. Although he noted that "starting salary * * * is heavily dependent on the education and work experience of each person offered employment" and that "the schools attended and the grade point average of a person also influences the starting salary," Levin testified that the average starting salary for engineers with a bachelor's degree and summer work experience at Texas Instruments is $46,800. For a person with a master's degree and summer work ex-

perience it is $54,000. For a Ph.D. with summer work experience it is $76,200.

The Committee also heard similar testimony from Kenneth M. Alvares, vice president, Human Resources, at Sun Microsystems. He said the starting salaries it offers for recent college graduates is $45,000 to $55,000, though those with more experience could start at more than $55,000. Microsoft testified to similar numbers. Alvares also testified that "of all the H–1B workers that Sun has hired, only a very small handful are actually recruited outside the United States and then brought into the country. The vast majority of H–1B's that Sun hires are already in the United States having graduated from United States schools—frequently at the top of their class."

In light of this lack of evidence that H–1B salaries are depressing the wages of Americans, the Committee rejects the idea of a new salary "floor" for individuals on H–1B's. Such a "floor" chosen by Congress would be completely arbitrary and as such would have negative and unintended consequences. The prevailing wage provisions in current law already require the individual on an H–1B to be paid at least the average paid to other similarly employed Americans.

### 3. THE IMPACT ON TRAINING AMERICANS

There is widespread agreement among Committee Members that more should be done about educating American young people for the jobs of tomorrow. Indeed, separate provisions of this legislation address that in a number of ways: Through a scholarship program included in the bill to help students major in engineering, mathematics, and computer science, and through provisions for training the unemployed in information technology at authorized levels higher than those announced in a small IT initiative put forward by the Clinton Administration earlier this year.

It has been suggested, however, that raising the cap on H–1B visas will have a negative effect on training programs, because it will undermine employers' commitment to providing American workers the necessary training. This claim, however, is belied by the evidence that industries that use H–1B's are already making very significant efforts to train Americans and indeed devote more of their own resources to worker training than those that do not use a significant number of H–1B visas. High tech firms spend $911 per employee on training vs. $300 per employee for nonhigh-tech firms, according to the American Society for Training and Development. Michael Murray of Microsoft testified that his company alone spends over $568 million annually on training and education. Sun Microsystems spends over $50 million a year, not including the 20,000 volunteer hours Sun employees are contributing to link U.S. schools to the Internet in economically disadvantaged areas. Despite these expenditures, Microsoft and Sun today have 2,522 and 2,000 unfilled technical positions respectively. Similarly, Texas Instruments spends over $100 million a year on training employees and has over 500 openings for skilled positions despite, like many companies, engaging in significant efforts to recruit on college campuses across the Nation.

In addition, Silicon Valley entrepreneurs are themselves making $200 million in charitable contributions to fund fellowships in science and engineering at Stanford University. And Silicon Valley executives this year helped pass a significant education reform package through the California state legislature. High tech executives in Virginia and in other states have similarly led efforts for educational reform.

4. THE ABRAHAM-HATCH SUBSTITUTE

The Abraham-Hatch Substitute to S. 1723 addresses the various aspects of the current crisis. First, it makes the necessary temporary increases in the 65,000 cap on H–1B visas. It raises that cap by 30,000 to 95,000 for fiscal year 1998. In 1999, 2000, 2001, and 2002, 10,000 visas would be subtracted from the 95,000, and those 10,000 would be allocated to a new H–1C category that would place a ceiling on physical therapists and other health care professionals. This new category is not an increase in physical therapists or other health care professionals but rather a ceiling. The creation of a new category, rather than a limitation within the H–1B category, was recommended by both the INS and State Department to ease and clarify administrative requirements for the agencies and other affected parties. To avoid disruptions in 1999 through 2002, the bill also allows up to 20,000 H–2B visas to be made available to the H–1B category if the H–2B visas are unused in the previous fiscal year. If visas are unused in the H–1C category in a prior year, those visas will likewise be made available for use, if necessary, in the H–1B category. Unlike the bill as originally introduced, the Substitute makes the increases in the cap temporary, in order to provide an opportunity for Congress to reexamine this subject in 5 years. In addition, at the suggestion of Senator Kyl, the Substitute added a provision requiring a study and report on high tech, United States, and global issues for the next 10 years overseen by the National Science Foundation and done by a panel established by the National Academy of Sciences to be transmitted to the Judiciary Committees of both Houses by October 1, 2000, to assist the Congress in performing that reexamination. The Substitute also includes provisions greatly toughening penalties for willful violators, including a provision not contained in the legislation as originally introduced but developed with the assistance of Senator Grassley imposing an unprecedented $25,000 fine and 2 year debarment for willful violations in the course of which an American worker is laid off. Second, the Substitute also authorizes $50 million for the State Student Incentive Grant (SSIG) program to create approximately 20,000 scholarships for up to $5000 a year for low-income students pursuing an associate, undergraduate, or graduate level degree in mathematics, engineering or computer science. The program provides dollar-for-dollar Federal matching funds that will grow to $100 million with State matching. The bill also authorizes $10 million a year to train unemployed American workers in new skills for the information technology industry and $8 million per year for an improved job database to match job skills and job openings in information technology.

### 5. OTHER POSSIBLE RESTRICTIONS ON H–1B VISAS AND THE COMMITTEE'S REASONS FOR DECLINING TO ADOPT THEM

America has a very diverse economy. To attempt to micromanage the human resources policies of companies through prohibitions, undue restrictions or requirements on H–1B visas is likely to have unintended and harmful consequences on U.S. businesses, universities, and nonprofit entities, as well as on the U.S. economy and the jobs for Americans that economy generates. In the absence of compelling, demonstrated offsetting benefits, adoption of such regulations would be unwise.

For these reasons, the Judiciary Committee declined to adopt a number of possible additional restrictions on H–1B visas proposed in a number of different quarters.

#### A. THE KENNEDY-FEINSTEIN AMENDMENT

Senators Kennedy and Feinstein proposed an amendment that contained a number of additional preconditions for hiring H–1B workers. The Committee's judgment was that for the most part, these preconditions were really solutions in search of a problem, but that their effect would have been to inject the U.S. government so far into the minutiae of the human resources policies of employers across America and render H–1B visas so cumbersome to use that most employers would simply refrain from hiring H–1B workers.

##### 1. GOVERNMENT-APPROVED RECRUITMENT

One provision of the Kennedy-Feinstein amendment was a requirement that before they could hire an H–1B worker, employers would have to attest that they had previously taken timely and effective steps to hire a qualified American. The full text of this provision reads:

> The employer, prior to filing the application, has taken timely, significant, and effective steps to recruit and retain sufficient United States workers in the specialty occupation in which the nonimmigrant whose services are being sought will be employed. Such steps include good faith recruitment in the United States, using procedures that meet industry-wide standards, offering compensation as required by subparagraph (A) [at least the prevailing wage], and offering employment to any qualified United States worker who applies or evidence that such good faith recruitment was unsuccessful.

There is a minor exception that might apply to some individuals who are "aliens with extraordinary ability, aliens who are outstanding professors and researchers, and certain multinational executives and managers." No such definition is now used for H–1B employment, and individuals who would qualify on it would likely be eligible for other visas. Individuals with great promise or potential, but perhaps lesser years of experience, would be unlikely to qualify for that narrow exception.

This provision "requires businesses to engage in a government approved process before they can hire any international workers,"

according to American Business for Legal Immigration (ABLI), a coalition of American businesses and associations. Such a requirement has enormous implications not simply for foreign nationals, but for how a U.S. employer recruits American employees. What it amounts to is a grant of power to the Department of Labor to pass in advance on the adequacy of the process through which any company that wishes to hire an H–1B worker engages in its ordinary recruitment of workers, most of whom are Americans. Any company that did not get such a pre-approval of its recruitment practices before hiring someone on an H–1B visa would face a serious risk of Federal penalties.

The problems with this sweeping grant of power are compounded by the fact that even with respect to some of the more modest obligations it currently is charged with enforcing, the DOL has shown little ability to give employers uniform and predictable interpretations and guidelines under which to function. Moreover, the system the DOL has devised before it will issue the "labor certification" that employers must have in order to obtain a visa for a permanent worker now generally takes 2 years. DOL has suggested that the procedure for meeting this new mandate would not be nearly so cumbersome, but it has not described what it would be.

To remain competitive in global markets, the Committee believes hiring decisions must remain the realm of U.S. companies and universities, rather than Federal bureaucrats. It is worth noting that in the context of permanent labor certifications, DOL has generally interpreted any "qualified" U.S. worker to be any worker who meets "minimum" criteria for the job as determined by the Department of Labor. The problem with this becomes more apparent if one uses a sports analogy. There are many people "qualified" to be a major league shortstop or second basemen. But to be most competitive teams try to hire the most qualified individual available for the job. Note that Congress has never barred major league baseball teams from hiring foreign-born shortstops simply because native-born individuals exists who might have some qualifications as well. Surely a researcher who contributes to a cure for cancer or Alzheimer's or a computer engineer who prepares products for export markets or provides IT services to hospitals is no less important to America than a 20-year-old with a quick glove and a strong right arm.

Raymond J. Uhalde, acting assistant secretary for employment and training, U.S. Department of Labor, testified before the Judiciary Committee on February 25 that the prior recruitment attestation simply amounted to "checking a box." With all respect, the Committee believes this does not accurately characterize the mandate this attestation would impose on U.S. businesses and universities. Any U.S. employer that "checks a box" on an attestation risks severe financial penalties, debarment from the use of H–1B visas and potential public embarrassment if that attestation is proven false or is inadequately documented. In order to be certain of compliance with such an attestation, an employer would have to follow DOL regulations—regulations that may not be forthcoming for a very long period of time if past experience is a guide—that spell out specifically which type of recruitment practices are acceptable to the Department of Labor for all professional employees in

the company, particularly those employed in positions remotely similar to those in which an individual on an H–1B might be hired. This amounts to micromanaging the human resources policies of U.S. companies and universities throughout America.

Universities have also pointed out the problems created by the prior recruitment attestation. According to the Association of American Universities, the College and University Personnel Association, NAFSA: Association of International Educators, and the National Association of State Universities and Land Grant Colleges, as applied to university hiring, this provision requires a policy of autarky, or native self-sufficiency, at odds with their mission of opening up their students to global perspectives. Moreover, they are concerned that this legislative language does not allow for consideration of the relative ability of different individuals. They write, "American higher education and academic-based research are world-renowned for their quality. That quality is a direct result of a commitment to recruit the most talented researchers and professors in the world. One of the country's greatest advantages is the ability of its higher education institutions to attract exceptional talent without regard to national borders."

2. THE "NO LAYOFF" ATTESTATION

The Kennedy-Feinstein Amendment also included a provision requiring employers to make a second new attestation as a condition of hiring an H–1B worker, this one concerning layoffs. This provision would have required an employer to state that it

> (i) has not, within the 6-month period prior to the filing of the application, laid off or otherwise displaced any United States worker (as defined in subparagraph (B), including a worker obtained by contract, employee leasing, temporary help agreement, or other similar basis, who has substantially equivalent qualifications and experience in the occupation classification for the position in which the nonimmigrant is intended to be (or is) employed; and
>
> (ii) will not lay off or otherwise knowingly displace, during the 90-day period following the filing of the application, or during the 90-day period immediately preceding the filing of any visa petition supported by the application, any United States worker, including any obtained by contract, who has substantially equivalent qualifications and experience in the occupation classification for the position for which the nonimmigrant is to be (or is) employed.

This provision is designed to forbid an employer from laying off an American worker in order to hire an H–1B worker with the same skills at a lower salary. Current law, however, already contains a prohibition designed to have the same effect. It forbids hiring H–1B workers at a salary below the higher of the prevailing or actual wage for people in that occupation. Moreover, there is no evidence that H–1B visas are in fact being used in this way. In response to a question from Senator Abraham at the February 25 hearing, DOL's Raymond Uhalde could cite in the past 7 years only one specific example known to DOL of a U.S. company laying off Americans and replacing them with individuals on H–1B visas,

though it was not indicated whether the degree of evidence that this example involved a purposeful one-for-one replacement by the original employer. Mr. Uhalde also alluded to press reports of other cases but provided the Committee with no details. To date, the Department of Labor has also failed to respond to written follow-up questions on this and other points that were submitted by the Committee in March, despite repeated requests for its answers.

In order to address any possible instances in which this might occur, however, S. 1723 as amended includes severe penalties of any employer who commits a willful violation of the prerequisites for hiring H–1B workers during the course of which it lays off a U.S. worker. The bill makes these employers subject to a fine of $25,000 per violation and a 2-year debarment from utilizing H–1B and all other employment-based immigrant visas. This narrowly targeted provision will penalize any employer who is truly guilty of the conduct giving rise to the concern.

By contrast, the provision contained in the Kennedy-Feinstein amendment was much broader. It very likely would have required a company to adopt a policy that prohibits layoffs of almost any employee currently working for it if the employer wanted even to ensure the option that it could later hire an individual on an H–1B visa. This is because if the employer had in the previous 6 months laid off anyone in the same "occupational classification" as the H–1B worker it sought to hire, even at a job site on the other side of the country, or if it did so within 90 days of hiring the H–1B worker, it would be in violation of this provision even if these other decisions had nothing to do with the hiring of the H–1B worker. This problem is further compounded by the fact that "occupational classifications" are very broad. Companies may have hundreds or even thousands of individuals employed in the same classification. If, for example, a computer engineer is laid off anywhere in the country by XYZ company, that company would be prohibited from hiring any other computer engineer on an H–1B visa, anywhere else, regardless of the differences in job duties the individuals perform or how many new jobs or innovations this new person might create.

The Association of American Universities, the College and University Personnel Association, NAFSA: Association of International Educators, and the National Association of State Universities and Land Grant Colleges state: "There is no evidence that American researchers are being laid off in order for universities to hire foreign H–1B researchers." They also find "very problematic" the broad occupational classifications to which the prohibition on layoffs would apply, pointing out many people fall into these categories who perform completely different functions. Additionally, they are concerned that the expiration of a grant could be considered a layoff and prevent the hiring of a whole range of people in the same classification, no matter how beneficial these individuals might be to the campus. Finally, university officials have told the committee that the legislative language contained in the Kennedy-Feinstein amendment means that any university that changes its course offerings or replaces a department and in the process changes its workforce composition will essentially be prohibited from hiring any foreign national. Such universities essentially will be shut out

from the use of H–1B visas, which will undermine the caliber of the Nation's institutions of higher learning.

For similar reasons, this provision would likely have a severe negative effect on other industries, such as entertainment and biomedical research. The Motion Picture Association of America endorsed the American Competitiveness Act, writing that "to remain competitive in our global marketplace it is essential that our industry have timely access to foreign professionals when the need arises. From digital animators to computer programmers to software engineers, highly skilled technical employees play a critical role in the production of motion pictures." Yet given the relatively short project duration of motion picture production, many people may be working for periods of limited duration, after which they may be considered "laid off." Thus this provision could effectively prohibit the American entertainment industry from employing individuals on H–1B's who could help in the production of animated and other films.

Representatives of the biomedical research community, both for profit and nonprofit, have also told the Committee that the prior recruitment and no-layoff attestations contained in the Kennedy-Feinstein language will prevent them from hiring talented researchers and limit their flexibility in choosing and ending research projects, concluding that if these provisions were to become law they could have a serious and negative impact on the development of potentially life-saving drugs in the United States.

Prohibiting or attempting to restrict layoffs in France and other countries has seriously harmed the functioning of those countries' economies. The Committee believes the real effect of a restriction of this sort will be either to limit American companies' access to foreign-born talent, which will help the companies' foreign competitors and thereby cost American jobs in the long run, or to drive U.S. companies to seek that talent by moving their facilities offshore, thereby eliminating American jobs in both the short and long term and helping foreign governments interested in attracting more investment, research and other facilities to their nations.

### 3. OTHER KENNEDY-FEINSTEIN PROVISIONS

*a. Limit on visa's term*

The Kennedy-Feinstein Amendment also contained a provision that would have limited the period of maximum stay for an individual on an H–1B to 3 years from the current 6 years. The Committee believes this would be unwise. Forcing individuals on H–1B visas to leave the country after 3 years would effectively give the benefit of any training they have received to the foreign competitors of U.S. companies.

*b. Grant of unfettered investigative authority to the Department of Labor*

The Kennedy-Feinstein Amendment also contained another provision that would have granted the Department of Labor unfettered authority to investigate any employer of an H–1B employee without a complaint having been filed. The Committee believes the case has not been made for granting this authority to DOL. In fiscal

year 1997, DOL found only three cases of willful failure to pay the required wage rates in the H–1B visa program, involving three visa holders. Since 1990, it has found only eight such violations, according to DOL.

Proponents of broader DOL authority have argued that this lack of identified willful violations is not significant, because it is explained not by the fact that these violations are not occurring but by the fact that individuals on H–1B's are reluctant to file complaints for fear that their employer will retaliate against them. They also argue that a DOL Inspector General's report shows wider abuse of H–1B's.

The claim that individuals on H–1B's are afraid of filing complaints is belied several different ways. First, Harris Miller, president of the Information Technology Association of America, pointed out at the Committee's hearing that H–1B visa holders are not the only sources of complaints. The entire purpose of the requirement that employers post the fact that they are hiring an H–1B worker at a particular salary is to provide an opportunity for third parties to file complaints. Any interested party, including U.S. workers, may file a complaint which DOL must investigate. Competitors can also be a prime source of complaints, Miller noted, because no one would like to see their competition receive a competitive advantage by employing people at below market wages.

Second, despite the availability of these other possible complainants, the DOL told a researcher in 1995 that H–1B nonimmigrants themselves were the number one source of complaints filed, according to Empower America. Nor is this fact surprising, for the premise that underlies DOL's contention, that H–1B workers are akin to "indentured servants" and will therefore refrain from complaining, is incorrect. There is considerable mobility among H–1B visa holders, who are sophisticated and knowledgeable employees. If an individual finds a better offer at another employer, he or she may simply be petitioned for by that new employer, a process that (at least right now) takes only approximately 1 month. This is quite common according to attorneys and human resources professionals in the field; the Department of Labor has provided no information disproving this and has left the misleading impression in public testimony that a nonimmigrant cannot change employers. In fact, as noted above, INS counting of H–1B's in 1997 was complicated by the fact that it was not counting "extensions" correctly—those H–1B visa holders who were employed by one U.S. employer and then hired by another U.S. employer.

Finally, numerous proimmigration and immigrant rights organizations have endorsed S. 1723. These groups would be unlikely to have done so if they believed widespread mistreatment of individuals on H–1B's was occurring in the United States.

The other argument offered in support of increased enforcement powers for DOL is a 1996 DOL Inspector General's audit report. Yet NAFSA: Association of International Educators published a thorough review of the audit report in a February 1998 report by legal scholar Steven Bell. NAFSA: Association of International Educators concluded:

> The audit report is filled with a series of fundamental errors, including factually inaccurate statements of con-

> gressional intent, lack of knowledge of the Immigration and Nationality Act, seriously flawed statistical methodology, and incorrect measurements of both the permanent and H–1B temporary visa process *sufficient to render the report completely invalid as a tool for policy makers.*

[Emphasis added.] Bell found that the 28-page DOL report contained more than 24 errors of a factual or legal nature—nearly one a page.

An analysis by the American Immigration Law Foundation also called the DOL audit report "highly questionable." That analysis concluded: "The audit report performed by the Office of the Inspector General so lacks context and basic references to immigration law that its value as a useful guide to future legislation should be severely questioned."

A third analysis published in Interpreter Releases also found the DOL Inspector General's report to be fundamentally flawed as a vehicle for evaluating employment visa issues.

To give just one example: the DOL Inspector's General's report considers it an abuse of the H–1B program for an employer to obtain such a visa on behalf of an employee whom the employer may seek to hire permanently. In fact, however, Congress decided specifically in the 1990 Immigration Act to allow "dual intent" for H–1B's, meaning that a nonimmigrant could enter on an H–1B petition without being prohibited by a consular officer even if it was concluded the nonimmigrant later intended to stay permanently in the United States by being sponsored for permanent residence by his or her employer.

Finally, it is worth noting that S. 1723 does grant the Department of Labor new authority to conduct investigations. The bill allows DOL to conduct spot inspections, without a complaint being filed, of employers who commit willful violations of the H–1B program. The probationary period in which such inspections can occur can last for up to 5 years at the discretion of the Secretary of Labor. This targets enforcement at known abusers rather than subjecting all employers to time-consuming and intrusive investigations. Georgetown University Professor Charles B. Keely writes, "Proposals to curtail use of temporary visas, especially the H–1B, are misdirected. More restrictive nonimmigrant visa policy, if unilaterally adopted by the United States, would ultimately be changed because such a policy will not alter competitive demands for international personnel movement."

### B. Feinstein Three Year Amendment

The Committee defeated an amendment by Senator Feinstein to raise the cap on H–1B visas only for 3 years, rather than the 5 years included in the Abraham-Hatch substitute. It seemed unlikely that the need for these additional visas would have vanished in 3 years, (or 2½ years, considering that we are now more than halfway through the current fiscal year). Should that projection prove incorrect, however, the numbers available for H–1B visas in S. 1723 are ceilings, not mandatory admissions. If employers use fewer of these visas, they will simply go unused, as happened from

1990 through Fiscal Year 1996. Insufficient numbers, on the other hand, hold great potential for disruption.

### C. Occupational Limitations

Although no amendment to this effect was offered, some have suggested that any increase in the H–1B visas available should be limited to high-tech workers. The Committee, however, was persuaded by the arguments of the ABLI coalition, which includes many high-tech employers. ABLI wrote to the Committee and stated,

> We oppose * * * separating "high-tech" workers from other H–1B recipients. Without appropriate knowledge of what constitutes a "high-tech" worker, imposing these distinctions will only serve to diminish the positive impact of the program. With the skills needed to compete in a global marketplace changing on an almost daily basis, today's high technology can quickly become yesterday's news. Creating a definition of "high-tech" worker is likely to put unreasonable constraints on the ability of American businesses to create jobs and generate economic growth.

In this connection, it seems worth noting that although it has variously been reported that according to the Department of Labor, in the past few years between 25 and 50 percent of those receiving H–1B's were perhaps physical therapists, in fact the DOL's Office of Employment and Training Administration (ETA) has told the Committee that DOL does not know how many individuals are admitted on H–1B's in which occupations in a given year. This is because this information would be kept not by DOL, but by INS, which issues the visas that confer admission. In fact, however, INS does not keep track of the occupations.

The information that DOL has, and that is the apparent source for the incorrect claims about physical therapists cited above, is salary information from the H–1B *approved certifications*. However, in a given year, there are as many as 6 times as many positions certified by DOL, nearly 400,000, as there are H–1B admissions, 65,000.

ETA has told the Committee that an occupation like physical therapy could readily be disproportionately represented in the number of approved certifications without these certifications bearing any relationship to actual admissions. This is because the certifications may be geographically limited but the firm recruiting the physical therapist may have a national scope. If the recruiting firm does not know where the H–1B individual will work, it may file and receive a dozen or more certifications for different geographic locations for that therapist, even though they will all eventually result in only one admission. In contrast, a university would likely only have one certified position for a researcher or professor.

Nevertheless, in order to address the issue of the use of H–1B visas by physical therapists, S. 1723 creates a separate temporary visa category for the use of physical therapists and other health care professionals, capped at 10,000 a year, starting in 1999. S. 1723 also requires the INS to collect and report data on the salaries and occupations of those admitted on H–1B visas.

### D. H–1B Dependent Employers

A proposal adopted by the Committee last Congress granted the DOL expanded powers and imposed some new attestations on employers of whose workforce H–1B workers constituted more than 20 percent. This was an effort to target increased enforcement resources on this kind of employer because the rare examples of abuses were believed to be concentrated among these employers. Further examination has revealed no available evidence of a correlation between the percentage of H–1B's in an employer's workforce and its propensity to willfully violate the law on H–1B's. In fact, it is possible that those employer's that rely on H–1B's the most would have the greatest incentive to obey the law, since disbarment from the program would hit such employers severely. The Committee has since become aware that these provisions would disproportionately affect small businesses. Moreover, on further reflection, the Committee has concluded that rather than targeting enforcement resources on certain kinds of employers, these resources should be targeted on employers with a record of violating the law. That is the approach S. 1723 currently takes.

### Conclusion

There are reasons to be concerned about the impact on America if the H–1B cap is not addressed. Thomas Friedman of the New York Times wrote recently, "If U.S. companies are told to put up 'No Vacancy' signs, they are inevitably going to move more knowledge operations overseas, and that will spur more innovation, wealth creation, and jobs over there." He points out many of those hired on H–1B visas are actually educated at American universities, noting "the idea that we would educate all these foreign computer engineers in U.S. universities and then send them home to compete with us is nuts."

Since 1990, the American economy has prospered and American companies have become world leaders in numerous fields. Foreign-born talent has played an important role in that success. The Committee believes that the American system of openness works and that imposing regulatory burdens that will, in effect, bar talented individuals from working in the United States simply because those individuals were not born in this country is not in keeping with the American tradition of welcoming to our shores people who can make a contribution to our economy and society.

## IV. VOTE OF THE COMMITTEE

On April 2, 1998, with a quorum present, the Committee on the Judiciary considered S. 1723, the American Competitiveness Act. Senators Kennedy and Feinstein offered an amendment in the nature of a substitute, which was defeated by a 10-to-8 vote. A Feinstein amendment to lower the period of time the additional H–1B visas would be made available in the bill from 5 years to 3 years was defeated by a 10-to-8 vote. The Committee then approved an Abraham-Hatch substitute by unanimous consent and voted 12-to-6 on final passage to report the bill favorably to the Senate floor.

RECORDED VOTES

VOTE ON KENNEDY-FEINSTEIN SUBSTITUTE AMENDMENT

| YEAS (8) | NAYS (10) |
|---|---|
| Leahy | Hatch |
| Kennedy | Thurmond |
| Biden | Grassley |
| Kohl | Specter (by proxy) |
| Feinstein | Thompson |
| Feingold (by proxy) | Kyl |
| Durbin | DeWine |
| Torricelli | Ashcroft (by proxy) |
| | Abraham |
| | Sessions (by proxy) |

VOTE ON FEINSTEIN AMENDMENT TO END THE INCREASE IN ADDITIONAL H–1B VISAS AFTER 3 YEARS

| YEAS (8) | NAYS (10) |
|---|---|
| Leahy | Hatch |
| Kennedy | Thurmond |
| Biden | Grassley (by proxy) |
| Kohl | Specter (by proxy) |
| Feinstein | Thompson |
| Feingold (by proxy) | Kyl |
| Durbin | DeWine |
| Torricelli | Ashcroft (by proxy) |
| | Abraham |
| | Sessions (by proxy) |

VOTE ON FINAL PASSAGE OF S. 1723

| YEAS (12) | NAYS (6) |
|---|---|
| Hatch | Leahy |
| Thurmond | Kennedy |
| Grassley (by proxy) | Biden |
| Specter (by proxy) | Feingold (by proxy) |
| Thompson | Durbin |
| Kyl | Torricelli |
| DeWine | |
| Ashcroft (by proxy) | |
| Abraham | |
| Sessions (by proxy) | |
| Kohl | |
| Feinstein | |

## V. SECTION-BY-SECTION ANALYSIS

THE ABRAHAM-HATCH SUBSTITUTE AMENDMENT FOR THE AMERICAN COMPETITIVENESS ACT S. 1723

*Section 1*

The Act may be cited as the "American Competitiveness Act."

*Section 2. Findings*

The Act makes the following findings:

- The National Software Alliance, a consortium of concerned government, industry, and academic leaders that includes the U.S. Army, Navy, and Air Force, has concluded that "The supply of computer science graduates is far short of the number needed by industry." The Alliance concludes that the current severe understaffing could lead to inflation and lower productivity.
- The U.S. Department of Labor projects that our economy will produce more than 130,000 information technology jobs in each of the next 10 years, for a total of more than 1.3 million.
- The Hudson Institute estimates that the unaddressed shortage of skilled workers throughout the U.S. economy will result in a 5 percent drop in the growth rate of GDP. That translates into approximately $200 billion in lost output, nearly $1,000 for every American.
- In fiscal year 1997, U.S. companies and universities reached the cap of 65,000 on H–1B temporary visas a month before the end of the fiscal year. In fiscal year 1998 the cap is expected to be reached as early as May if Congress takes no action. And it will be hit earlier each year until backlogs develop of such a magnitude as to prevent U.S. companies and researchers from having any timely access to skilled foreign-born professionals.
- It is vital that more American young people be encouraged and equipped to enter technical fields, such as mathematics, engineering, and computer science.
- If American companies cannot find home-grown talent, and if they cannot bring talent to this country, a large number are likely to move key operations overseas, sending those and related American jobs with them.
- Inaction in these areas will carry significant consequences for the future of American competitiveness around the world and will seriously undermine efforts to create and keep jobs here in the United States.

*Section 3. Increased access to skilled personnel for U.S. companies and universities—additional numbers sunset after 5 years*

The Abraham-Hatch substitute to S. 1723, which passed the Judiciary Committee 12 to 6, would increase the 65,000 cap by 30,000 to 95,000 for fiscal year 1998. In 1999, 2000, 2001, and 2002, 10,000 visas would be subtracted from the 95,000, and those 10,000 would be allocated to a new H–1C category that would place a ceiling on physical therapists and other nonphysician health care professionals. This new category is not an increase in physical therapists or other health care professionals but rather a ceiling. The creation of a new category, rather than a limitation within the H–1B category, was recommended by both the INS and State Department to ease and clarify administrative requirements for the agencies and other affected parties. In addition, to avoid disruptions in 1999 through 2002, the bill allows up to 20,000 H–2B visas to be made available to the H–1B category if the H–2B visas are unused in the previous fiscal year. If visas are unused in the H–1C cat-

egory in a prior year, those visas also will be made available for use, if necessary, in the H–1B category. Also to avoid disruptions, the bill states that any H–1B petition filed in fiscal year 1998, even if not approved until fiscal year 1999, will be counted against the new fiscal year 1998 cap called for in the legislation.

| | H–1B Visas | H–1C Visas (New Category for Physical Therapists and Other Health Care Workers) |
|---|---|---|
| FY 1998 | 95,000 (current projected usage for FY 1998) | |
| FY 1999 | 85,000 (plus a maximum of 20,000 H–2B visas if unused in previous fiscal year). | 10,000 |
| FY 2000 | Same as above | *10,000 |
| FY 2001 | Same as above | *10,000 |
| FY 2002 | Same as above | *10,000 |

Note: *If H–1C visas are unused in a fiscal year, they will be made available to the H–1B category in the next year.

*Section 4. Education and training in science and technology*

The intent of this section of the bill is to authorize $50 million for the State Student Incentive Grant (SSIG) program to create approximately 20,000 scholarships a year for low-income students pursuing an associate, undergraduate, or graduate level degree in mathematics, engineering or computer science. The program provides dollar-for-dollar Federal matching funds that will grow to $100 million with State matching. The scholarships will be for up to $5,000 each. The bill also authorizes $10 million a year to train unemployed American workers in new skills for the information technology industry.

The $50 million for the scholarships is intended to be on top of the current $105 million authorized for the program. The legislative language in this bill strikes the $105 million and inserts $155 million. Although the intent is to authorize only $50 million annually, because the Higher Education Act has not yet passed and been reauthorized in this fiscal year, the Congressional Budget Office is scoring the entire SSIG program as being reauthorized by the American Competitiveness Act. This has resulted in scoring of $155 million annually for the scholarships in S. 1723, rather than $50 million. This artificially inflates the bill's total scoring by CBO by $105 million a year.

This section also authorizes $10 million and $8 million respectively per year for training unemployed individuals in information technology and an improved job database to match job skills and job openings in information technology.

*Section 5. Increased enforcement penalties and improved operations*

(a) Increased Penalties for Violations of H–1B or H–1C Program. The bill increases fines by five-fold for willful violators of the H–1B or H–1C program, from the current $1,000 to $5,000.

(b) Spot Inspections During Probationary Period. This section allows the Department of Labor to conduct spot inspections, without a complaint being filed, of employers who commit willful violations of the H–1B program after the passage of this act. The probationary period in which such inspections can occur can last for up to 5 years at the discretion of the Secretary of Labor based on the severity of the offense.

(c) Layoff Protection for U.S. Workers. Section 5 adds a significant ground for violation and fines for those failing to meet their statutory responsibilities. If an employer using the H–1B program is found liable for willfully failing to meet a condition of employment under the H–1B attestations (such as a failure to pay the required wage), or for making a willful misrepresentation of a material fact, the administrative judge investigating the case can also determine whether the employer has laid off U.S. workers in the same jobs and replaced them with H–1B workers in the same jobs. If so, the employer will be fined $25,000 per violation and debarred from participating in the H–1B program and the permanent employment visa program for 2 years. The intent of this section is that this penalty be reserved for cases where the employer willfully underpays the required wage to an H–1B employee and in the course of that violation replaces a U.S. worker laid off from the same specific job with the individual on an H–1B visa whom the employer willfully underpaid.

(d) Expedited Reviews and Decisions. This subsection requires INS to adjudicate H–1B petitions within 30 days. The Committee finds that INS currently takes up to 3 months to adjudicate H–1B petitions in some regions. To remain competitive, U.S. companies must have the ability to obtain skilled foreign workers in as timely and efficient a manner as possible.

(e) Determinations on Labor Condition Attestation To Be Made By Attorney General. This subsection transfers authority for adjudication of Labor Condition Attestations (LCA) from the Secretary of Labor to the Attorney General. Enforcement authority with respect to LCA's will remain with the Secretary of Labor. Currently, employers file the LCA with the Regional DOL office. DOL merely checks the LCA for completeness. Absent a complaint, DOL does not investigate nor certify the accuracy of the information. Once certified, the LCA is then filed with the rest of the H–1B petition at the INS regional service center. The Committee believes the H–1B administrative process will be streamlined by moving LCA certification to the INS. A copy of the LCA would still be filed with DOL and DOL would retain all current enforcement authority. It is estimated that this transfer will eliminate 1 to 3 weeks processing time for employers seeking H–1B workers. Further, because of the large number of LCA's filed and the significant cuts in funding for alien labor certification programs, substantial resources are being diverted from DOL's processing of permanent labor certification applications to LCA's. This has contributed to significant backlogs for permanent labor certifications in some regions. Transferring LCA certification would add little burden to INS while freeing DOL resources to process permanent labor certification applications.

(f) Prevailing Wage Considerations. Under current law an employer must attest on a Labor Condition Attestation that an individual on an H–1B will be paid the greater of the actual or prevailing wage paid to similarly employed U.S. workers. The bill seeks to correct for the inaccuracies in the current Department of Labor use and calculation of prevailing wage data.

In Subsection (i)(1) the legislation provides that the prevailing wage level at institutions of higher education and nonprofit re-

search institutes shall take into account only employees at such institutions. The provision separates the prevailing wage calculations between academic and research institutions and other nonprofit entities and those for for-profit businesses. Higher education institutions and nonprofit research institutes conduct scientific research projects, for the benefit of the public and frequently with Federal funds, and recruit highly-trained researchers with strong academic qualifications to carry out their important missions. The bill establishes in statute that wages for employees at colleges, universities, nonprofit research institutes, and other nonprofit entities must be calculated separately from industry.

Subsection (i)(2) modifies the prevailing wage criteria for professional sports. The Committee finds that where there is a collective bargaining agreement (CBA), the minimum wage established therein should be considered to be the prevailing pay rate. Where no CBA exists, the prevailing wage should be the minimum salary mandated by the professional sports league which teams must pay players—foreign nationals as well as U.S. workers. The system currently employed to determine the prevailing wage for minor league professional sports uses a "mean wage." Because salaries for professional athletes vary greatly (up to 20 times difference between lowest and highest paid players), using the mean wage to calculate prevailing wage actually encourages the leagues to pay approximately 50 percent of the U.S. athletes a lower salary than similarly situated foreign national athletes. This current system is a disincentive to increase U.S. workers' salaries.

Subsection (i)(3) enables U.S. companies to use the same wage surveys generally relied upon in setting salaries for U.S. workers (whether they are regional, national, industry, or statewide surveys) to determine the prevailing wage for foreign workers. The Committee finds that companies are often unable to rely upon the market information used to determine wages for U.S. workers when calculating the prevailing wage for a foreign national simply because the survey does not meet DOL's requirement that the survey be limited to a specific geographical region or be cross-industry. In many occupations, salary is determined on a national, regional or industry basis. DOL would still have the ability to challenge the employer's prevailing wage determination based on these broader criteria. Employers attempting to use "sham" surveys to willfully underpay foreign workers would be subject to enhanced fines, inspections and debarment.

(g) Posting Requirement. This provision allows employers to post LCA in the same manner as other job notices, including via electronic posting. For many companies, particularly those with remote employees, electronic posting provides notice to a greater number of employees than traditional posting on a bulletin board. The Committee believes that DOL regulations should reflect current business practices, including the use of technology to recruit and inform workers, to the extent possible.

*Section 6. Annual and quarterly reports on H–1B visas*

This section requires quarterly reports on H–1B numbers. It also mandates annual reports on the occupations and compensation of

aliens provided nonimmigrant status under such section during the previous fiscal year.

*Section 7. Study*

This section requires a study and report on high tech, U.S., and global issues for the next 10 years overseen by the National Science Foundation and done by a panel established by the National Academy of Sciences to be transmitted to the Judiciary Committees of both Houses by October 1, 2000.

*Section 8. Limitation on per country ceiling with respect to employment-based immigrants*

This section modifies per country limits on employment-based visas to eliminate the discriminatory effects of those per country limits on nationals from certain Asian Pacific nations. Currently, in a given year there are employment-based immigrant visas available within the annual limit of 140,000, yet U.S. law prevents individuals born in particular countries from being able to join employers who want to sponsor them as permanent employees because those countries have reached their per country limit. This amounts to preventing an employer from hiring or sponsoring permanently in that year someone because he or she is Chinese or Indian, even though the individuals meets all the proper legal criteria set forth by the U.S. government. The bill would end this prohibition itself leaving intact the annual level of 140,000.

Section 8 also provides limited relief for nationals from countries who today have been adversely affected by the increasing demand for certain employment-based immigrant visas. The provision modifies the current caps on employment based visas for individuals from what are considered to be "over-subscribed" countries, while leaving intact the total limit on employment-based immigration. If there are still unused employment-based immigrant visas available after the employment-based visas issuable during any calendar quarter have been issued according to the per-country limitations, those visas may then be issued without regard to the country of origin of the recipient. They may be issued, however, only to the limit of the total number of employment-based visas available for each category. The intention of this provision is to have no adverse impact on family immigration levels, particularly as it relates to the interaction of the per country limits on family and employment-based immigration.

The section also affords a one-time protection for those who have previously been adversely affected, based upon their country of origin. The provision allows those with approved petitions, who cannot receive the immigrant visa because of the per country limit, to stay until such a visa becomes available. These immigrants would otherwise be forced to return home at the conclusion of their allotted time in H–1B status, disrupting projects and American workers. The provision enables these few individuals to remain in H–1B status until they are able to receive an immigrant visa and adjust their status within the United States, thus limiting the disruption to American businesses.

*Section 9. Academic honoraria*

This section permits universities and other nonprofit entities to pay honoraria and incidental expenses for a usual academic activity or activities by visiting scholars and individuals holding similar visas.

## VI. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington DC, April 24, 1998.*

Hon. ORRIN G. HATCH,
*Chairman, Committee on the Judiciary,*
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1723, the American Competitiveness Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Christina Hawley Sadoti and Mark Grabowicz.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

### CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

#### S. 1723—AMERICAN COMPETITIVENESS ACT

*As reported by the Senate Committee on the Judiciary on April 2, 1998*

*Summary*

S. 1723 would increase the number of nonimmigrant (temporary) visas available for certain skilled workers, authorize appropriations for various student assistance and job-training programs of the Department of Education (ED) and the Department of Labor (DOL), and make several other changes to current laws relating to the employment of immigrants. Assuming appropriation of the necessary funds, CBO estimates that implementing S. 1723 would result in additional discretionary spending of about $690 million over the 1999–2003 period (if such sums authorizations are funded with adjustments for inflation after 1999) or $670 million (if they are funded at the 1999 level in all years). In addition, we estimate that the bill would increase direct spending by $1 million annually and receipts by less than $500,000 annually. Because S. 1723 would affect direct spending and receipts, pay-as-you-go procedures would apply.

S. 1723 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 (UMRA). The bill would increase the authorization of grants to states for educational grants to students of mathematics, computer science, and engineering.

*Description of the bill's major provisions*

S. 1723 would amend part A, subpart 4 of Title IV of the Higher Education Act of 1965, relating to funds for state student incentive grants for degrees in mathematics, computer science, and engineering. The bill would authorize appropriations of $155 million for fiscal year 1999 and such sums as may be necessary for the following four fiscal years to ED for these purposes.

S. 1723 also would direct DOL to improve its Internet-based job bank in order to better accommodate job seekers in the area of technology. In addition, it would require DOL to provide training in information technology to unemployed individuals who are seeking jobs. The bill would authorize $18 million per year for fiscal years 1999 through 2003 for these purposes—$8 million for the job bank and $10 million for job training.

S. 1723 would direct the National Academy of Sciences (NAS) to oversee a study to assess the labor market needs for workers with high technology skills during the next 10 years. The bill would require a report summarizing the results of the study by October 1, 2000.

This legislation would increase the number of nonimmigrant visas for certain skilled workers. The bill would increase available visas by 30,000 in fiscal year 1998, by up to 50,000 in each of the fiscal years 1999 through 2002, and by 10,000 in each year thereafter. The bill also would remove the current cap on the number of employment-related immigrant (permanent) visas that can be granted to persons from any one country in each year.

S. 1723 would transfer from DOL to the Attorney General certain tasks relating to the review of employer applications to hire nonimmigrant labor. Finally, it would provide for new and increased civil monetary penalties for violations of certain laws relating to the hiring of nonimmigrant workers.

*Estimated cost to the Federal Government*

The estimated budgetary impact of S. 1723 is shown in the following table. The bill would authorize such sums as are necessary for ED programs for fiscal years 2000 through 2003. The estimated authorization levels shown in the table reflect continued funding at the authorized level for 1999, with adjustments for anticipated inflation in subsequent years. The estimated changes in outlays subject to appropriation action total about $690 million over the 1999–2003 period. Alternatively, if the 2000–2003 authorization levels for state student incentive grants are held constant at the 1999 level—without adjusting for anticipated inflation—the total change in discretionary outlays would be about $670 million over the same period. The costs of this legislation fall within budget functions 500 (education, employment, training, and social services) and 750 (administration of justice).

*Basis of estimate—Spending subject to appropriation*

For the purposes of this estimate, CBO assumes that the estimated authorization levels for ED and DOL programs will be appropriated at the start of each fiscal year, with outlays following the historical spending trends for the authorized activities. For the authorization of such sums as necessary for ED's state student in-

centive grants, the estimates in the table reflect annual adjustments for anticipated inflation.

Based on information from the NAS, CBO estimates that the study required by the bill would cost $2 million to $3 million over fiscal years 1999 and 2000, subject to the availability of appropriated funds.

| | By fiscal year, in millions of dollars | | | | | |
|---|---|---|---|---|---|---|
| | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 |
| SPENDING SUBJECT TO APPROPRIATION | | | | | | |
| Spending Under Current Law: | | | | | | |
| Estimated Authorization Level [1] | 175 | 153 | 157 | 161 | 164 | 168 |
| Estimated Outlays | 169 | 155 | 123 | 156 | 158 | 162 |
| Proposed Changes: [2] | | | | | | |
| Estimated Authorization Level | 0 | 175 | 176 | 180 | 184 | 188 |
| Estimated Outlays | 0 | 20 | 137 | 172 | 179 | 183 |
| Spending Under S. 1723: | | | | | | |
| Estimated Authorization Level | 175 | 328 | 333 | 341 | 348 | 356 |
| Estimated Outlays | 169 | 175 | 260 | 328 | 337 | 345 |
| CHANGES IN DIRECT SPENDING | | | | | | |
| Estimated Budget Authority | 0 | 1 | 1 | 1 | 1 | 1 |
| Estimated Outlays | 0 | 1 | 1 | 1 | 1 | 1 |
| CHANGES IN REVENUES | | | | | | |
| Estimated Revenues | 0 | [3] | [3] | [3] | [3] | [3] |

[1] The 1998 level is sum of amounts appropriated for that year for state student incentive grants ($25 million), and for the State Unemployment Insurance and Employment Service Operations (SUIESO), where the job bank is currently funded. SUIESO is permanently authorized at such sums as may be necessary. One-Stop Career Centers (OSCC), the SUIESO account from which the job bank is funded, received an appropriation of $150 million for 1998. The OSCC authorization levels shown for 1999 through 2003 reflect inflation adjustments to the 1998 level.

[2] Without adjustments for inflation, additional outlays would be $20 million in 1999, $136 million in 2000, $168 million in 2001, and $172 million in each of the years 2002 and 2003.

[3] Less than $500,000.

*Direct spending and revenues*

S. 1723 would increase the number of nonimmigrant visas available to certain skilled workers by 30,000 in fiscal year 1998, by up to 50,000 in each of the fiscal years 1999 through 2002, and by 10,000 in each year thereafter. The increases in immigration in 1999 through 2002 would depend on the number of unused visas from other categories that—under the bill's provisions—could be granted to skilled workers. The fee for these visas is $85, so enacting the bill could increase fees collected by the Immigration and Naturalization Service (INS) by up to about $3 million in 1998, by about $4 million in each of the fiscal years 1999 through 2002, and by about $1 million in each year thereafter. We expect that the INS would spend the fees (without appropriation action), mostly in the year in which they are collected, so enacting S. 1723 would result in a negligible net budgetary impact on annual spending by the INS.

Current law provides for a cap on the number of employment-related immigrant visas that can be granted to natives of any one country in a given year. The bill would remove this cap, which could increase the number of visas granted and thus the amount of fees collected by the INS. We expect that additional fees would not exceed $500,000 annually, most of which would be spent in the same year, resulting in a negligible net budgetary impact.

Under current procedures, DOL administers the review and approval process for employers that want to hire nonimmigrants; S.

1723 would transfer some of these responsibilities to the INS. The net effect on federal spending of this shift in workload would be negligible, but increased spending by the INS probably would come from existing fee income and would be classified as direct spending (whereas the current spending by DOL is discretionary). CBO estimates that direct spending would increase by about $1 million annually, accompanied by an equivalent reduction in spending by DOL that would be subject to appropriation. It is possible that the INS eventually could offset this increase in spending by raising fees for nonimmigrant visas, but CBO has no basis for predicting when or if any change in fees would occur.

S. 1723 would provide for new and increased civil penalties that could be assessed against employers that violate certain laws relating to hiring immigrant labor. This could result in increased collections of civil fines, which are classified as revenues (governmental receipts), but we estimate that any such increase would be less than $500,000 annually.

*Pay-as-you-go considerations*

Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 sets up pay-as-you-go procedures for legislation affecting direct spending or receipts. The net changes in outlays and governmental receipts that are subject to pay-as-you-go procedures are shown in the following table. For the purposes of enforcing pay-as-you-go procedures, only the effects in the current year, the budget year, and the succeeding four years are counted.

| | By fiscal year, in millions dollars | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 |
| Changes in outlays ..... | 0 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 |
| Changes in receipts ..... | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

*Estimated impact on State, local, and tribal governments*

S. 1723 contains not intergovernmental mandates as defined in UMRA. The bill would increase the authorization of grants to states for educational grants to students of mathematics, computer science, and engineering.

*Estimated impact on the private sector*

This bill contains no private-sector mandates as defined in UMRA.

Estimate prepared by: DOL and ED costs: Christina Hawley Sadoti; INS and NAS costs: Mark Grabowicz.

Estimate approved by: Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

## VII. REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b)(1), rule XXVI of the Standing Rules of the Senate, it is hereby stated that the Committee finds that the bill will have no additional direct regulatory impact.

## VIII. ADDITIONAL VIEWS OF SENATORS LEAHY, KENNEDY, BIDEN, FEINGOLD, DURBIN, TORRICELLI, AND FEINSTEIN

### INTRODUCTION

All of us want to be responsive to our Nation's need for high-tech workers. High-tech industries are the top source of job growth in America today and in the coming years. The Labor Department's Bureau of Labor Statistics projects that there will be over 1.3 million job openings for computer programmers and engineers between 1996 and the year 2006. That is 138,000 new computer jobs every year. Our free market is already adjusting to the demand for more workers as greater and greater numbers of Americans seek the training they need to compete for these good jobs.

The majority report makes the case for temporarily increasing the quota of visas in the "H–1B" visa program to respond to our Nation's need for high-tech workers. We agree that the quota should be increased. But the majority views miss the key point—that how we do this really matters.

It matters to American workers who want these high-skilled, high-wage jobs. It matters to out Nation's future competitiveness. And it matters to our innovative high-tech industries as they seek to remain on the cutting edge well into the next century.

The very fact that we need to increase the immigration quota—even temporarily—is an embarrassing indictment of our failure to provide adequate training opportunities for our own workers.

Most of us voted against the committee bill and some of us voted for it. But we all supported the Kennedy-Feinstein substitute because we are united in the belief that it represents a better way. It raises the quota while assuring U.S. workers of two important commitments:

- that real training opportunities are on the way so they can compete for these good, high tech jobs in the new economy.
- that programs intended to protect workers will be held accountable.

It is not enough to throw in the towel and just raise the visa numbers. In raising the quota, we have an obligation to provide real money to train U.S. workers to compete for these good jobs. And we must strengthen enforcement and accountability in the program to guarantee that U.S. firms are not gaming the high quotas by laying off U.S. workers and hiring cheaper foreign replacements.

### INCREASE H–1B NUMBERS, BUT ONLY TEMPORARILY

We believe that a temporary increase in the 65,000 annual cap on H–1B visas is warranted—not a permanent change in the quota. Even the substitute language adopted by the Committee abandons the permanent increase called for in S. 1723 as introduced and in-

stead sunsets the increase after a 5-year period. That is certainly a step in the right direction.

The wise course of action is to permit a temporary increase in the H–1B cap. Failing to provide for this increase could put at risk the health and competitiveness of America's thriving computer industry.

This is too important an issue to make policy based on guesswork. A short-term increase will buy us time to study the size and expected duration of the worker shortfall. While there have been studies of the high-tech labor-market performed by the Information Technology Association of America (ITAA) [1] and the Department of Commerce, we cannot be confident in their reliability. The General Accounting Office analyzed those studies in a March 20 report and found the Department of Commerce study suffers from "serious analytical and methodological weaknesses that undermine the credibility of its conclusion that a shortage of information technology workers exists" and criticized the methodology of the ITAA study a well. GAO concluded that "additional information and data are needed to more accurately characterize the information technology labor market now and in the future." [2]

A temporary increase fills the gap while our free market economy works its magic. The U.S. labor market appears to be adjusting as it should to the demand for high-tech workers. And we should not tilt the balance unfairly against U.S. workers by guaranteeing employers that they can always tap into a growing pool of foreign workers.

As the Immigration Subcommittee heard in testimony, "Ironically, the policy of expanding immigrant visas for information technology positions is potentially counter-productive because it can increase uncertainty and reduce the incentive to enter the field. Prospective U.S. students may choose not to prepare for the information technology field if they see that foreigners will gain easy access to visas simply by entering an information technology occupation." [3]

In fact, there are already indications that there are more computer scientists in the college pipeline than there have been in the recent past. Computer science enrollment has dramatically reversed its declining trend since 1995, jumping by 91 percent from fall 1995 to fall 1997, according to data provided by the Computing Research Association (CRA), a national consortium of university computer science departments.[4]

But as GAO points out, college enrollments in computer degrees is not the sum total of computer programmers entering high-tech positions. According to a National Science Foundation study, only a quarter of those working as programmers had computer science

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[1] The majority report asserts that the GAO made a mistake in evaluating the ITAA's study responses, and that the actual response rate was 60 percent rather than 36 percent as reported by GAO. The ITAA study states that out of the sample of 1,493 employers, 597 interviews were conducted. The remaining 961 firms were not interviewed for a variety of reasons; 597 interviews out of a 1,493 sample calculates out to an overall response rate of 36 percent.

[2] "Information Technology: Assessment of the Department of Commerce's Report on Workforce Demand and Supply (GAO/HEHS–98–106, Mar. 20, 1998). p. 2.

[3] "Information Technology Workers and Public Policy," hearing before the Committee on the Judiciary, 105th Cong., Feb. 25, 1998 (testimony of Dr. Robert I. Lerman, Director, Human Resources Policy Center, Urban Institute).

[4] 1996–1997 Computing Research Association Taulbee Survey, Dexter Kozen and Stu Zweben, co-chairs.

degrees. The remainder held degrees from such diverse fields as business, social science, math, psychology, economics, education, political science, and physical science.[5]

There are other factors to look at when we try to size up the scope and duration of any shortages of computer personnel. For example, we need to count the willing and skilled middle-aged and older computer workers who, while not fresh out of college, have a wealth of experience in the computer field and who can be rapidly retrained to fill the open jobs. And we must also consider what will happen just a few years down the road, when the many thousands of analysts and programmers now dedicated to solving the Year 2000 crisis are available to do other projects.

All of the above are clear indicators to "go slow" on infusing foreign workers into our labor market. And raising the immigration quota only temporarily is consistent with this approach.

## TRAINING U.S. WORKERS: THE COMMITTEE BILL DOES NOT ASSURE U.S. WORKERS OF A SINGLE ADDITIONAL DIME FOR THEIR TRAINING

The movement is open the doors to more foreign workers is obscuring an embarrassing fact—this country's failure to give U.S. workers the skills they need to take advantage of these good high-tech jobs. We all agree that the first, best way to fill the jobs in the computer profession is to find qualified U.S. workers for them. If it takes additional training to ready them for it, then we should make that training accessible.

As Senator Feinstein has put it,

> America must make a long-term investment in our nation's children so that our high tech industries are not dependent on foreign workers as a long-term solution. There is no question that the American high tech industry must remain competitive in the international marketplace. But as we address this important issue, we must not lose sight of the need to ensure that American workers and our children are prepared to meet the needs of a 21st century economy. * * * Permanently increasing the number of foreign workers is the wrong answer to our long-term need for high tech workers.[6]

The jobs that are up for grabs in the H–1B category are worth fighting for. According to statistics from the Department of Labor, three-quarters of the jobs for which employers seek H–1B workers pay between $25,000 and $50,000.[7] These are good, middle-class jobs in a desirable and growing field.

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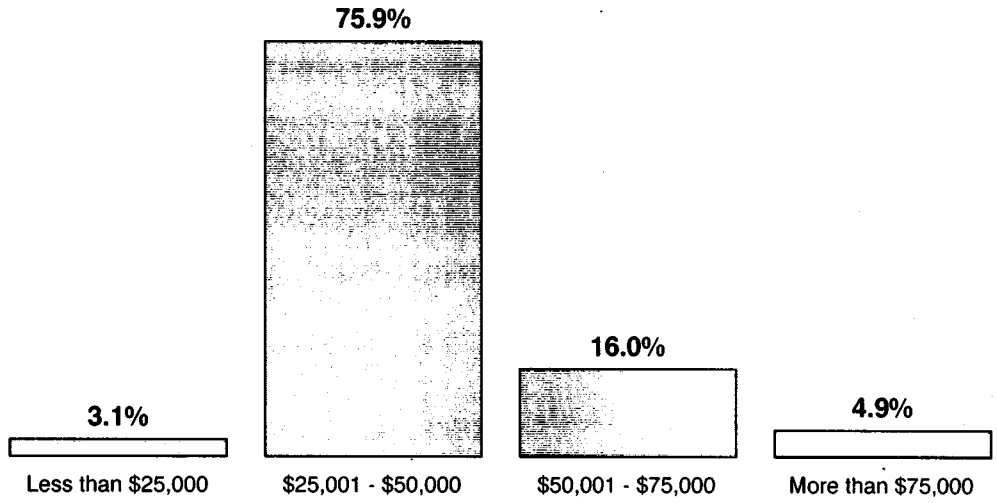
[5] National Science Foundation's SESTAT Data System on Scientists and Engineers, Division of Science Resources Studies.

[6] Statement of Senator Feinstein on Mar. 26, 1998, issued prior to introduction of S. 1878, "The High Tech Immigration and United States Worker Protection Act."

[7] U.S. Department of Labor, Employment and Training Administration, FY1997 data on H–1B jobs certified * * *.

# The "Best and Brightest?"

## Most Jobs for which Employers Seek H-1B Workers Pay Less Than $50,000 a Year




**Source: USDOL\ETA FY 1997 data on H-1B jobs certified.**

*The Committee bill fails to assure American workers that a single dime will go toward their training.*—It is only an authorization and must compete with other priority programs for every dime it gets. The Committee bill authorizes $10 million a year to train unemployed U.S. workers in new skills for the information technology industry and authorizes $8 million for online talent banks. In addition, the Committee bill calls for the authorization of an additional $50 million for the State Student Incentive Grant (SSIG) program to create a scholarships for low-income students who pursue degrees in math, engineering or computer science.

In fact, the Senate Labor Committee recently reported a bill reauthorizing the Higher Education Act including a redesign of the SSIG program, renamed the Leveraging Educational Assistance Program (LEAP). The 1998 amendments to the Higher Education Act, including this provision, was voted out of the Labor Committee unanimously. We should not undo the thoughtful redesign of this program created by the committee of jurisdiction.

Unlike the Committee substitute, the Kennedy-Feinstein proposal would have put real money on the table for American workers. Instead of relying on taxpayer dollars for additional training, it proposed a $250 application fee for each foreign worker sought under the immigration quota. This modest fee would raise approximately $100 million each year which could be used to fund training opportunities for American workers. And it accomplishes it without using a single dime of the taxpayers' money.

ACCOUNTABILITY: BEFORE ADDING EVEN ONE VISA TO THE QUOTA, WE MUST ASSURE EMPLOYERS AND WORKERS THAT THE LAWS WILL BE EQUALLY ENFORCED

Any law worth passing is worth enforcing. Right now, under the H–1B visa program, the Department of Labor is hamstrung by a compliant-driven system of enforcement. The only time that the Labor Department can intervene to make certain an employer is playing by the rules is when a complaint has been filed against that employer. This limitation makes it nearly impossible to hold employers accountable for promises they make about fair treatment of their workers. U.S. workers need to be secure in the knowledge that the laws on the books are being enforced and their jobs are being protected.

The Kennedy-Feinstein substitute that was narrowly voted down in Committee would have established simple steps to address the lack of accountability measures now found in the H–1B program. The need for accountability resonates well beyond the Judiciary minority. In the House, H.R. 3736, introduced by the chairman of the House Subcommittee on Immigration and Claims, also reflects concerns about enforcement, and that bill was passed by voice vote out of the House Immigration Subcommittee.

Two years ago, the Inspector General of the Labor Department completed the most comprehensive study every made of our laws and procedures for admitting foreign workers. Some may quibble with certain findings of the report, as evidenced by the majority views, but there is no disputing the hard facts: 75 percent of employers hiring temporary foreign workers could not prove that they

paid the proper wage. That was out of a survey of 720 cases covering employers in twelve states.

Of the few who properly documented the wages paid, 19 percent paid the foreign workers below the promised wage. These are hard facts, not matters of interpretation. These figures tell us that "the system is broken and needs to be fixed." In fact, that was the title of the Inspector General's report.[8]

The program needs greater authority and resources to initiate investigations when employers have broken the law, such as failing to pay the proper wage and comply with the other requirements for hiring foreign workers. Under current law, the Labor Department cannot intervene unless there is a complaint—and few workers are willing to complain, because they are afraid of losing promotions or even losing their jobs.

The Department of Labor's ability to ensure accountability in this program is far more limited under current law than under other similar programs. It is strikingly so when compared to enforcement powers vested in other bodies which watch over labor conditions and immigration requirements. For example, INS investigators can inspect certain hiring documents of employers at any time to ensure that they are not hiring illegal immigrants. No complaint is required, and employers must provide "reasonable access" to INS officers.[9]

Similarly, within the Department of Labor itself, the Wage and Hour Division has extensive investigative authority. For example, labor inspectors may investigate any industry for compliance with the Fair Labor Standards Act, as well as the Family and Medical Leave Act, without requiring that a compliant first be lodged.[10] Wage and Hour can also investigate, without a complaint being filed, compliance of the Migrant and Seasonal Agricultural Worker Protection Act.[11] The same is true in connection with its enforcement authority under the Public Contracts Act and Service Contracts Act.[12] In each of the instances just named, the Department also has supeona authority,[13] which it lacks in its enforcement activities connected with the H–1B program. Wage and Hour also has statutory authority to ensure employer compliance with the terms and conditions of employment under the H–2A Temporary Agricultural Workers immigration program; again, no complaint is required in order for an investigation to commerce.[14]

It is unfair to the vast majority of honest employers to ignore unscrupulous practices by the few. Honest employers should not have to compete against dishonest ones who too easily get away with cutting costs by abusing and underpaying foreign workers.

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[8] "The Department of Labor's Foreign Labor Certification Programs: The System is Broken and Needs To Be Fixed" U.S. Department of Labor Office of Inspector General Office of Audit, Rept. No. 06–96–002–03–321.

[9] See section 274A (e) and (f) of the Immigration and Nationality Act (8 U.S.C. 1324(a)).

[10] Fair Labor Standards Act (FLSA) and Family and Medical Leave Act (FMLA), 29 U.S.C. 211(a) and 2616(a).

[11] Migrant and Seasonal Agricultural Worker Protection Act (MSPA) 29 U.S.C. 1862(a).

[12] Public Contracts Act (PCA) and Services Contracts Act (SCA) 41 U.S.C. 38 and 353(a).

[13] For FLSA and FMLA, 29 U.S.C. 209 and 2616(d); for MSPA, 29 U.S.C. 1862(b); for PCA and SCA, 41 U.S.C. 39 and 353(a).

[14] Immigration and Nationality Act, 9 U.S.C. 1188(g)(2).

## ATTESTATION BY EMPLOYERS AGAINST LAYOFF

Believe it or not, it is perfectly legal under the current immigration law for employers to lay off American workers and replace them with foreign workers in the same job. The Kennedy-Feinstein substitute proposed to outlaw this practice. It said employers can't get H–1B workers if in the last 6 months they have laid off U.S. workers in jobs requiring "substantially equivalent qualifications and experience." And if they lay off such workers during the 90 days after the H–1B workers arrives, then the H–1B worker is the first to go—not the American worker.

The no-layoff assurance from employers is not a complicated process. It would be accomplished through the simple addition of a checkoff box on a form employers complete when they apply to bring in foreign workers.

The Committee substitute recognizes that layoffs are a problem and contains a narrow layoff protection for U.S. workers that would be applicable only in very limited circumstances. Instead of providing a fig leaf, we believe we must provide U.S. workers with real layoff protection under the H–1B program by requiring employers to attest, as a condition of participation in the H–1B program, that they have not laid off U.S. workers and sought to replace them with foreign workers under the H–1B visa program.

## RECRUITMENT ATTESTATION

Most Americans agree that U.S. workers should get first crack at these good jobs. Common sense suggests that U.S. employers would look at home before recruiting workers from abroad. But this is not a requirement under current law.

The need for this requirement is further underscored by the fact that most workers entering under this program are lower-level professionals who earn less than $50,000 a year—not the best and brightest. In fact, as the majority views state, "many H–1Bs are foreign students recruited off U.S. college campuses."

Because of this fact, the Kennedy-Feinstein substitute required that employers attest that they have looked at home first before they submit an application for an H–1B worker. We believe that most employers do this already. In fact, the majority views describe companies "desperate for workers" and record numbers of recruitment ads being run in the newspapers. Therefore, the majority of high-tech employers will have no trouble attesting that they have made a good-faith effort at recruiting workers in the United States. Under Kennedy-Feinstein, in completing the application for foreign workers under the H–1B program, they would have checked the box marked "recruitment," and moved on.

However, we exempted the best and brightest workers from this new requirement. We are the last ones who would hinder operations on university campuses and at research institutes by barring the entry of a researcher who could unlock the mystery of Alzheimer's, or the crown-jewel professor sought by an American university's physics department. We made specific allowances that waive the recruitment requirements for those with extraordinary ability, such as outstanding professors, researchers, and certain multinational executives and managers.

We are not proposing to duplicate the recruitment process that is required before bringing in a worker on a permanent, immigrant visa. That is admittedly, and justifiably, a more complex process. Our substitute language simply required that employers use normal industrywide methods and standards to advertise job openings in the United States.

The majority views suggest that we should cede determinations of immigration law and policy to America's CEO's They argue that requirements to recruit at home first, before seeking workers from abroad, are "micromanagement of the human resources policies of U.S. companies and universities throughout America."

We believe, however, that we have a duty to ensure that our immigration laws and policies represent a proper balance—that they strive to meet the needs of our businesses, protect our workers, and otherwise reflect our national interests.

The substitute amendment adopted by the Committee fails to acknowledge the obvious—that Americans can't compete for job openings that they are not told about. We believe that American workers, properly trained, can stand toe-to-toe with foreign workers and be competitive for the gamut of jobs now being filled thought the H–1B program.

### These Requirements Will Not Lengthen the Application Process

None of the steps that need to be taken to provide accountability should delay the processing of applications for temporary workers. In fact, the Kennedy-Feinstein amendment, unlike the Committee substitute, would have expedited the processing of employers' applications. It did this by providing real money, at least $5 million, taken from the $250 fee paid by employers, to be used by the Department of Labor to carry out enforcement activities and take measures necessary to speed up processing.

The Committee substitute, on the other hand, will make matters worse. It shifts responsibility for handling employers' applications from the Labor Department to INS. We are concerned that INS is already overwhelmed with a huge backlog of other immigration applications. It takes INS a year or more to process applications filed by American citizens to bring their spouses and children here—supposedly a very high priority at INS. And it take 2 years or more for INS to process an application for American citizenship.

We believe that it is a mistake to assign this program to an agency such as INS—already so overwhelmed with other backlogs and management challenges.

The current procedure under the H–1B program simply requires an employer to submit a one-page form to the Labor Department. On that form the employers attest, by checking a box, that they have met the program criteria. The Labor Department does not investigate before approving the application. There is no lengthy screening process. The employers' attestation is accepted as is, as long as it contains no glaring inaccuracies.

The Kennedy-Feinstein proposal would not have changed this process an iota. It would simply have added two more boxes to the current form on which employers would have attested (1) that they have not laid off U.S. workers in the job they are now trying to fill

with foreign workers, and (2) they have tried and failed, to recruit workers locally for that job. That's all. No reams of documents are required for submission to the Labor Department for approval. Just two additional check marks on the same form employers file now.

## CONCLUSION

We are committed to meeting the needs of our high-tech industry. But we also need to be committed to getting a fair deal for U.S. workers. We believe the Kennedy-Feinstein substitute came far closer to achieving these goals than the Committee bill.

PATRICK LEAHY.
EDWARD KENNEDY.
JOSEPH BIDEN, Jr.
DIANNE FEINSTEIN.
RUSSELL FEINGOLD.
RICHARD DURBIN.
ROBERT TORRICELLI.

## IX. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 1723, as reported, are shown as follows (existing law which would be omitted is enclosed in bold brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman type):

# UNITED STATES CODE

* * * * * * *

# Title 8—Aliens and Nationality

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### CHAPTER 12—IMMIGRATION AND NATIONALITY

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### Subchapter II—Immigration

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## PART II—ADMISSION QUALIFICATIONS FOR ALIENS; TRAVEL CONTROL OF CITIZENS AND ALIENS

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### § 1182. Excludable aliens

(a) CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.—Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * * * * * *

(n) LABOR CONDITION APPLICATION.—(1) No alien may be admitted or provided status as a nonimmigrant described in section 1101(a)(15)(H)(i)(b) of this title in an occupational classification unless the employer has filed with the Secretary of Labor an application stating the following:

* * * * * * *

(2)(A) The Secretary shall establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in an application submitted under paragraph (1) or a petitioner's misrepresentation of material

facts in such an application. Complaints may be filed by any aggrieved person or organization (including bargaining representatives). No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively. The Secretary shall conduct an investigation under this paragraph if there is reasonable cause to believe such a failure or misrepresentation has occurred.

* * * * * * *

(C) If the Secretary finds, after notice and opportunity for a hearing, **[**a failure to meet a condition of paragraph (1)(B), a substantial failure to meet a condition of paragraphs (1)(C) or (1)(D), a willful failure to meet a condition of paragraph (1)(A), or a misrepresentation of material fact in an application—**]** *a willful failure to meet a condition in paragraph (1) or a willful misrepresentation of a material fact in an application—*

(i) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed **[**$1,000**]** *$5,000* per violation) as the Secretary determines to be appropriate, and

(ii) the Attorney General shall not approve petitions filed with respect to that employer under section 1154 or 1184(c) of this title during a period of at least 1 year for aliens to be employed by the employer.

*(D) The Secretary of Labor may, on a case-by-case basis, subject an employer to random inspections for a period of up to five years beginning on the date that such employer is found by the Secretary of Labor to have engaged in a willful failure to meet a condition of subparagraph (A), or a misrepresentation of material fact in an application.*

**[**(D)**]** *(E)* If the Secretary finds, after notice and opportunity for a hearing, that an employer has not paid wages at the wage level specified under the application and required under paragraph (1), the Secretary shall order the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of paragraph (1), whether or not a penalty under subparagraph (C) has been imposed.

*(F)(i) If the Secretary finds, after notice and opportunity for a hearing, a willful failure to meet a condition in paragraph (1) or a willful misrepresentation of a material fact in an application, in the course of which the employer has replaced a United States worker with a non-immigrant described in section 101(a)(15)(H)(i) (b) or (c) within the 6-month period prior to, or within 90 days following, the filing of the application—*

*(I) the Secretary shall notify the Attorney General of such finding, and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $25,000 per violation) as the Secretary determines to be appropriate; and*

*(II) the Attorney General shall not approve petitions filed with respect to the employer under section 204 or 214(c) during a period of at least 2 years for aliens to be employed by the employer.*

*(ii) For purposes of this subparagraph:*

*(I) The term "replace" means the employment of the nonimmigrant at the specific place of employment and in the specific employment opportunity from which a United States worker with substantially equivalent qualifications and experience in the specific employment opportunity has been laid off.*

*(II) The term "laid off", with respect to an individual, means the individual's loss of employment other than a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant, contract, or other agreement. The term "laid off" does not include any situation in which the individual involved is offered, as an alternative to such loss of employment, a similar employment opportunity with the same employer at the equivalent or higher compensation and benefits as the position from which the employee was discharged, regardless of whether or not the employee accepts the offer.*

*(III) The term "United States worker" means—*

*(aa) a citizen or national of the United States;*

*(bb) an alien who is lawfully admitted for permanent residence; or*

*(cc) an alien authorized to be employed by this Act or by the Attorney General.*

* * * * * * *

**§ 1184. Admission of nonimmigrants**

(a) REGULATIONS.—(1) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribed, including when he deems necessary the giving of a bond with sufficient sure in such sum and containing such conditions as the Attorney General shall prescribe, insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United states. No alien admitted Guam without a visa pursuant to section 1182(*l*) of this title may be authorized to enter or stay in the United States other than in Guam or to remain in Guam for a period exceeding fifteen days from date of admission to Guam. No alien admitted to the United States without a visa pursuant to section 1187 of this title may be authorized to remain in the United States as a nonimmigrant visitor for a period exceeding 90 days from the date of admission.

* * * * * * *

(c) PETITION OF IMPORTING EMPLOYER; INVOLVEMENT OF DEPARTMENTS OF LABOR AND AGRICULTURE.—(1) The question of importing any alien as a nonimmigrant under section 1101(a)(15)(H), (L), (O), or (P)(i) of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition, shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval

of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant. For purposes of this subsection with respect to nonimmigrants described in section 1101(a)(15)(H)(ii)(a) of this title, the term "appropriate agencies of Government" means the Department of Labor and includes the Department of Agriculture. The provisions of section 1188 of this title shall apply to the question of importing any alien as a nonimmigrant under section 1101(a)(15)(H)(ii)(a) of this title.

(2)(A) * * *

* * * * * * *

(C) The Attorney General shall provide a process for reviewing and acting upon petitions under this subsection with respect to nonimmigrants described in section 101(a)(15)(L) or section *101(a)(15)(H)(i)(b)* with 30 days after the date of completed petition has been filed.

* * * * * * *

**[**(g) TEMPORARY WORKERS AND TRAINEES; LIMITATION ON NUMBERS.—(1) The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year (beginning with fiscal year 1992)—

**[**(A) under section 1101(a)(15)(H)(i)(b) of this title may not exceed 65,000, or

**[**(B) under section 1101(a)(15)(H)(ii)(b) of this title may not exceed 66,000.

**[**(C) Repealed. Pub. L. 102–232, Title II, § 202(a), Dec. 12, 1991, 105 Stat. 1737**]**

*(g)(1) The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year—*

*(A) under section 101(a)(15)(H)(i)(b)—*

*(i) for each of fiscal years 1992 through 1997, may not exceed 65,000,*

*(ii) for fiscal year 1998, may not exceed 95,000,*

*(iii) for fiscal year 1999, may not exceed the number determined for fiscal year 1998 under such section, minus 10,000, plus the number of unused visas under subparagraph (B) for the fiscal year preceding the applicable fiscal year, and*

*(iv) for fiscal year 2000, and each applicable fiscal year thereafter through fiscal year 2002, may not exceed the number determined for fiscal year 1998 under such section, minus 10,000, plus the number of unused visas under subparagraph (B) for the fiscal year preceding the applicable fiscal year, plus the number of unused visas under subparagraph (C) for the fiscal year preceding the applicable fiscal year;*

*(B) under section 101(a)(15)(H)(ii)(b), beginning with fiscal year 1992, may not exceed 66,000; or*

*(C) under section 101(a)(15)(H)(i)(c), beginning with fiscal year 1999, may not exceed 10,000.*

*For purposes of determining the ceiling under subparagraph (A) (iii) and (iv), not more than 20,000 of the unused visas under subparagraph (B) may be taken into account for any fiscal year.*

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# TITLE 20—EDUCATION

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## CHAPTER 28—HIGHER EDUCATION RESOURCES AND STUDENT ASSISTANCE

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### Subchapter IV—Student Assistance

## PART A—GRANTS TO STUDENTS IN ATTENDANCE AT INSTITUTIONS OF HIGHER EDUCATION

## Subpart 1—Basic Educational Opportunity Grants

### § 1070a. Basic educational opportunity grants: amount and determinations; applications

(a) PROGRAM AUTHORITY AND METHOD OF DISTRIBUTION.—(1) The Secretary shall, during the period beginning July 1, 1972, and ending September 30, 1998, pay to each eligible institution such sums as may be necessary to pay to each eligible student (defined in accordance with section 1091 of this title) for each academic year during which that student is in attendance at an institution of higher education, as an undergraduate, a basic grant in the amount for which that student is eligible, as determined pursuant to subsection (b) of this section. Not less than 85 percent of such sums shall be advanced to eligible institutions prior to the start of each payment period and shall be based upon an amount requested by the institution as needed to pay eligible students, except that this sentence shall not be construed to limit the authority of the Secretary to place an institution on a reimbursement system of payment.

* * * * * * *

### § 1070c. Purpose; appropriations authorized

(a) PURPOSE OF SUBPART.—It is the purpose of this subpart to make incentive grants available to States to assist States in providing grants to—

* * * * * * *

(b) AUTHORIZATION OF APPROPRIATIONS; AVAILABILITY.—(1) IN GENERAL.—There are authorized to be appropriated **[**$105,000,000 for fiscal year 1993**]** *$155,000,000 for fiscal year 1999*, and such sums as may be necessary for each of the 4 succeeding fiscal years, *of which the amount in excess of $25,000,000 for each fiscal year*

*that does not exceed $50,000,000 shall be available to carry out section 415F for the fiscal year.*

***SEC. 415F. DEGREE IN MATHEMATICS, COMPUTER SCIENCE, AND ENGINEERING.***

*(a) ALLOTMENTS AND GRANTS.—From amounts made available to carry out this section under section 415A(b)(1) for a fiscal year, the Secretary shall make allotments to States to enable the States to pay not more than 50 percent of the amount of grants awarded to low-income students in the States.*

*(b) USE OF GRANTS.—Grants awarded under this section shall be used by the students for attendance on a full-time basis at an institution of higher education in a program of study leading to an associated, baccalaureate or graduate degree in mathematics, computer science, or engineering.*

*(c) COMPARABILITY.—The Secretary shall make allotments and grants shall be awarded under this section in the same manner, and under the same terms and conditions, as—*

*(1) the Secretary makes allotments and grants are awarded under this subpart (other than this section); and*

*(2) are not inconsistent with this section.*

* * * * * * *

# Immigration and Nationality Act

## TITLE I—101 DEFINITIONS

SEC. 101. (a) As used in this Act—

(1) The term "administrator" means the official designated by the Secretary of State pursuant to section 104(b) of this Act.

* * * * * * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens

(A)(i) an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government recognized de jure by the United States and who is accepted by the President or by the Secretary of State, and the members of the alien's immediate family;

* * * * * * *

(H) an alien

(i)(a) who is coming temporarily to the United States to perform services as a registered nurse, who meet the qualifications described in section 212(m)(1), and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that an unexpired attestation is on file and in effect under section 212(m)(2) for each facility (which facility shall include the petitioner and each worksite, other than a private household worksite, if the worksite is not the alien's employer or controlled by the employer) for which the alien will perform the services, or (b) subject

to section 212(j)(2), who is coming temporarily to the United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than services described in subclause (ii)(a) or in subparagraph (O) or (P)) *and other than services described in clause (c)* in a specialty occupation described in section 214(i)(1) or as a fashion model, who meets the requirements for the occupation specified in section 214(i)(2) or, in the case of a fashion model, is of distinguished merit and ability, and **[**with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary**]** *with respect to whom the Attorney General determines that the intending employer has filed with the Attorney General* an application under section 212(n)(1)*, or (c) who is coming temporarily to the United States to perform labor as a health care worker, other than a physician, in a specialty occupation described in section 214(i)(1), who meets the requirements of the occupation specified in section 214(i)(2), who qualifies for the exemption from the grounds of inadmissibility described in section 212(a)(5)(C), and with respect to whom the Attorney General certifies that the intending employer has filed with the Attorney General an application under section 212(n)(1)*; or

(ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

*(i)(1) In computing the prevailing wage level for an occupational classification in an area of employment for purposes of section 212(n)(1)(A)(i)(II) and section 212(a)(5)(A) in the case of an employee of—*

*(A) an institution of higher education (as defined in section 1201(a) of the Higher Education Act of 1965), or a related or affiliated nonprofit entity, or*

*(B) a nonprofit or Federal research institute or agency,*

*the prevailing wage level shall only take into account employees at such institutions, entities, and agencies in the area of employment.*

*(2) With respect to a professional athlete (as defined in section 212(a)(5)(A)(iii)(II)) when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations shall be considered as not adversely affecting the wages of United States workers similarly employed and be considered the prevailing wage.*

*(3) To determine the prevailing wage, employers may use either government or nongovernment published surveys, including industry, region, or statewide wage surveys, to determine the prevailing wage, which shall be considered correct and valid if the survey was conducted in accordance with generally accepted industry*

*standards and the employer has maintained a copy of the survey information.*

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# TITLE II—IMMIGRATION

## CHAPTER 1—SELECTION SYSTEM

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WORLDWIDE LEVEL OF IMMIGRATION

SEC. 201. (a) IN GENERAL.—Exclusive of aliens described in subsection (b), aliens born in a foreign state or dependent area who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence are limited to—

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SEC. 202. (a) PER COUNTRY LEVEL.—

(1) NONDISCRIMINATION.—Except as specifically provided in paragraph (2) and in sections 101(a)(27), 201(b)(2)(A)(i), and 203, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

(2) PER COUNTRY LEVELS FOR FAMILY-SPONSORED AND EMPLOYMENT-BASED IMMIGRANTS.—Subject to **[**paragraphs (3) and (4)**]** *paragraphs (3), (4), and (5)*, the total number of immigrant visas made available to natives of any single foreign state or dependent area under subsections (a) and (b) of section 203 in any fiscal year may not exceed 7 percent (in the case of a single foreign state) or 2 percent (in the case of a dependent area) of the total number of such visas made available under such subsections in that fiscal year.

* * * * * * *

(D) LIMITING PASS DOWN FOR CERTAIN COUNTRIES SUBJECT TO SUBSECTION (e).—In the case of a foreign state or dependent area to which subsection (e) applies, if the total number of visas issued under section 203(a)(2) exceeds the maximum number of visas that may be made available to immigrants of the state or area under section 203(a)(2) consistent with subsection (e) (determined without regard to this paragraph), in applying paragraphs (3) and (4) of section 203(a) under subsection (e)(2) all visas shall be deemed to have been required for the classes specified in paragraphs (1) and (2) of such section.

*(5) RULES FOR EMPLOYMENT-BASED IMMIGRANTS.—*

*(A) EMPLOYMENT-BASED IMMIGRANTS NOT SUBJECT TO PER COUNTRY LIMITATION IF ADDITIONAL VISAS AVAILABLE.—If the total number of visas available under paragraph (1), (2), (3), (4), or (5) of section 203(b) for a calendar quarter exceeds the number of qualified immigrants who may otherwise be issued such visas, the visas made avail-*

*able under that paragraph shall be issued without regard to the numerical limitation under paragraph (2) of this subsection during the remainder of the calendar quarter.*

*(B) LIMITING FALL ACROSS FOR CERTAIN COUNTRIES SUBJECT TO SUBSECTION (e).—In the case of a foreign state or dependent area to which subsection (e) applies, if the total number of visas issued under section 203(b) exceeds the maximum number of visas that may be made available to immigrants of the state or area under section 203(b) consistent with subsection (e) (determined without regard to this paragraph), in applying subsection (e) all visas shall be deemed to have been required for the classes of aliens specified in section 203(b).*

* * * * * * *

(e) SPECIAL RULES FOR COUNTRIES AT CEILING.—If it is determined that the total number of immigrant visas made available under subsections (a) and (b) of section 203 to natives of any single foreign state or dependent area will exceed the numerical limitation specified in subsection (a)(2) in any fiscal year, in determining the allotment of immigrant visa numbers to natives under subsection (a) and (b) of section 203, visa numbers with respect to natives of that state or area shall be allocated (to the extent practicable and otherwise consistent with this section and section 203) in a manner so that—

(1) * * *

* * * * * * *

(3) **[**the proportion of the visa numbers**]** *except as provided in subsection (a)(5), the proportion of the visa numbers* made available under each of paragraphs (1) through (5) of section 203(b) is equal to the ratio of the total number of visas made available under the respective paragraph to the total number of visas made available under section 203(b).

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## CHAPTER 2—QUALIFICATIONS FOR ADMISSION OF ALIENS; TRAVEL CONTROL OF CITIZENS AND ALIENS

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SEC. 212. (a) CLASSES OF EXCLUDABLE ALIENS.—Except as otherwise provided in this Act, the following describes classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into the United States:

* * * * * * *

(n)(1) No alien may be admitted or provided status as a nonimmigrant described in section 101(a)(15)(H)(i) (b) *or (c)* in an occupational classification unless the employer has filed with the **[**Secretary of Labor**]** *Attorney General* an application stating the following:

(A) The employer—

(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status as

a nonimmigrant described in section 101(a)(15)(H)(i)(b) wages that are at least—

* * * * * * *

(C) The employer, at the time of filing the application—

(i) has provided notice of the filing under this paragraph to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought, or

**[**(ii) if there is no such bargaining representative, has posted notice of filing in conspicuous locations at the place of employment.**]**

*(ii) if there is no such bargaining representative, has provided notice of filing in the occupational classification through such methods as physical posting in a conspicuous location, or electronic posting through an internal job bank, or electronic notification available to employees in the occupational classification.*

* * * * * * *

The employer shall make available for public examination, within one working day after the date on which an application under this paragraph is filed, at the employer's principal place of business or worksite, a copy of each such application (and such accompanying documents as are necessary). The Secretary *of Labor* shall compile, on a current basis, a list (by employer and by occupational classification) of the applications filed under this subsection. Such list shall include the wage rate, number of aliens sought, period of intended employment, and date of need. The Secretary *of Labor* shall make such list available for public examination in Washington, D.C. The **[**Secretary of Labor**]** *Attorney General* shall review such an application only for completeness and obvious inaccuracies. **[**Unless the Secretary finds that the application is incomplete or obviously inaccurate, the Secretary shall provide the certification described in section 101(a)(15)(H)(i) (b) *or (c)* within 7 days of the date of the filing of the application.**]** *Unless the Attorney General finds that the application is incomplete or obviously inaccurate, the Attorney General shall provide the certification described in section 101(a)(15)(H)(i)(b) and adjudicate the nonimmigrant visa petition.*

(2)(A) The **[**Secretary**]** *Secretary of Labor* shall establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in an application submitted under paragraph (1) or a petitioner's misrepresentation of material facts in such an application. Complaints may be filed by any aggrieved person or organization (including bargaining representatives). No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively. The Secretary shall conduct an investigation under this paragraph if

there is reasonable cause to believe that such a failure or misrepresentation has occurred.

* * * * * * *

(D) If the Secretary finds, after notice and opportunity for a hearing, that an employer has not paid wages at the wage level specified under the application and required under paragraph (1), the Secretary shall order the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of paragraph (1), whether or not a penalty under subparagraph (C) has been imposed.

*Such application shall be filed with the employer's petition for a non-immigrant visa for the alien, and the Attorney General shall transmit a copy of such application to the Secretary of Labor.*

*(3) Using data from petitions for visas issued under section 101(a)(15)(H)(i)(b), the Attorney General shall annually submit the following reports to Congress:*

*(A) Quarterly reports on the numbers of aliens who were provided nonimmigrant status under section 101(a)(15)(H)(i)(b) during the previous quarter and who were subject to the numerical ceiling for the fiscal year established under section 214(g)(1).*

*(B) Annual reports on the occupations and compensation of aliens provided nonimmigrant status under such section during the previous fiscal year.*

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(o) An alien who has been physically present in the United States shall not be eligible to receive an immigrant visa within ninety days following departure therefrom unless—

* * * * * * *

*(p) Any alien admitted under section 101(a)(15)(B) may accept an honorarium payment and associated incidental expenses for a usual academic activity or activities, as defined by the Attorney General in consultation with the Secretary of Education, if such payment is offered by an institution of higher education (as defined in section 1201(a) of the Higher Education Act of 1965) or other nonprofit entity and is made for services conducted for the benefit of that institution or entity.*

* * * * * * *

SEC. 214. (a)(1) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may be regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 248, such alien will depart from the United States. No alien admitted to Guam without a visa pursuant to section 212(l) may be authorized to enter or stay in the United States other than in Guam or to remain in Guam for a period exceeding fifteen days from date of admission to Guam. No alien admitted to the United States without a visa pursuant to section 217 may be authorized

to remain in the United States as a nonimmigrant visitor for a period exceeding 90 days from the date of admission.

* * * * * * *

(i)(1) For purposes of section 101(a)(15)(H)(i) (b) *or (c)* and paragraph (2), the term "specialty occupation" means an occupation that requires—

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

(2) For purposes of section 101(a)(15)(H)(i) (b) *or (c)*, the requirements of this paragraph, with respect to a specialty occupation, are—

(A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

(B) completion of the degree described in paragraph (1)(B) for the occupation, or

(C) (i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

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